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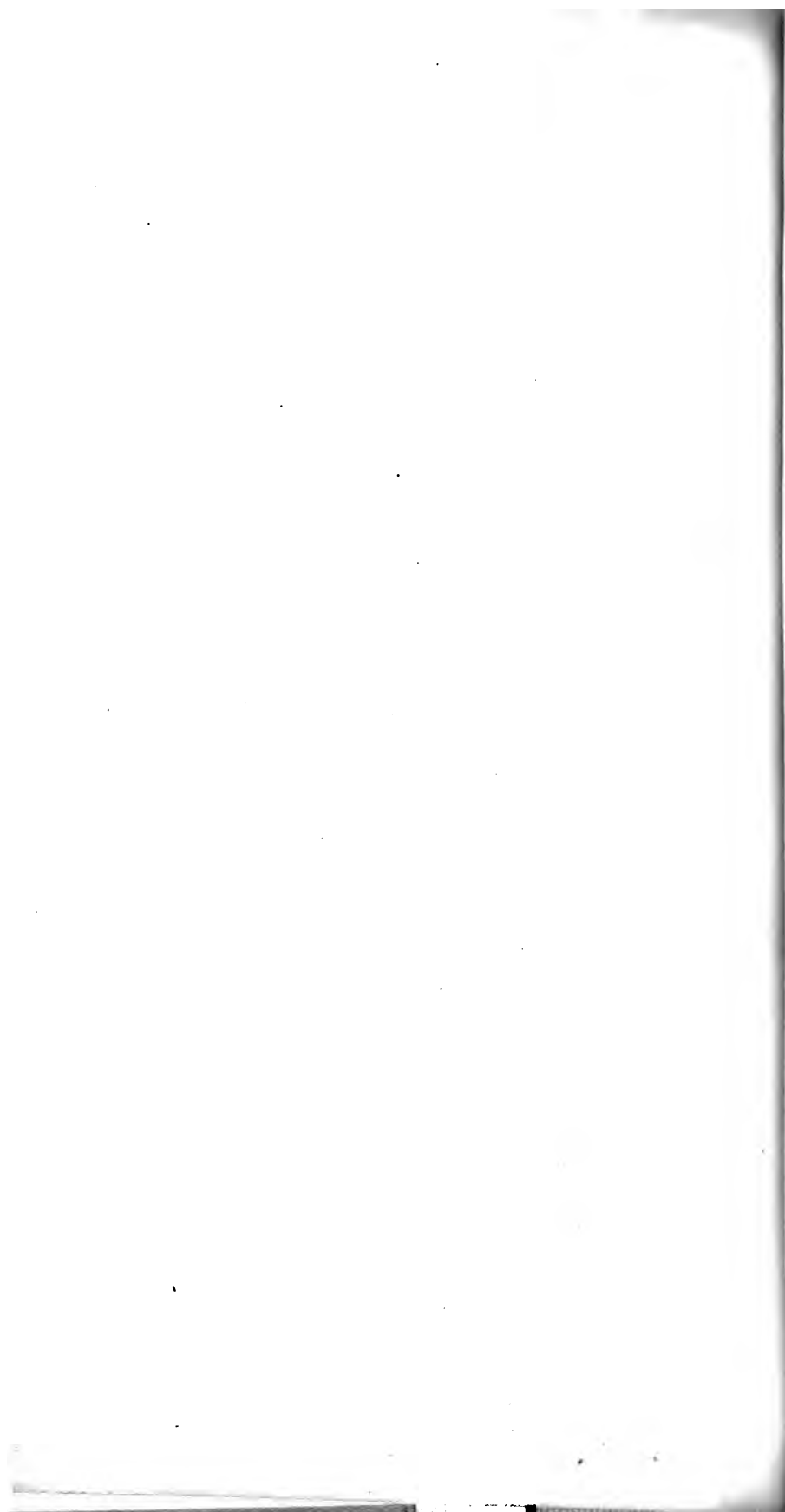
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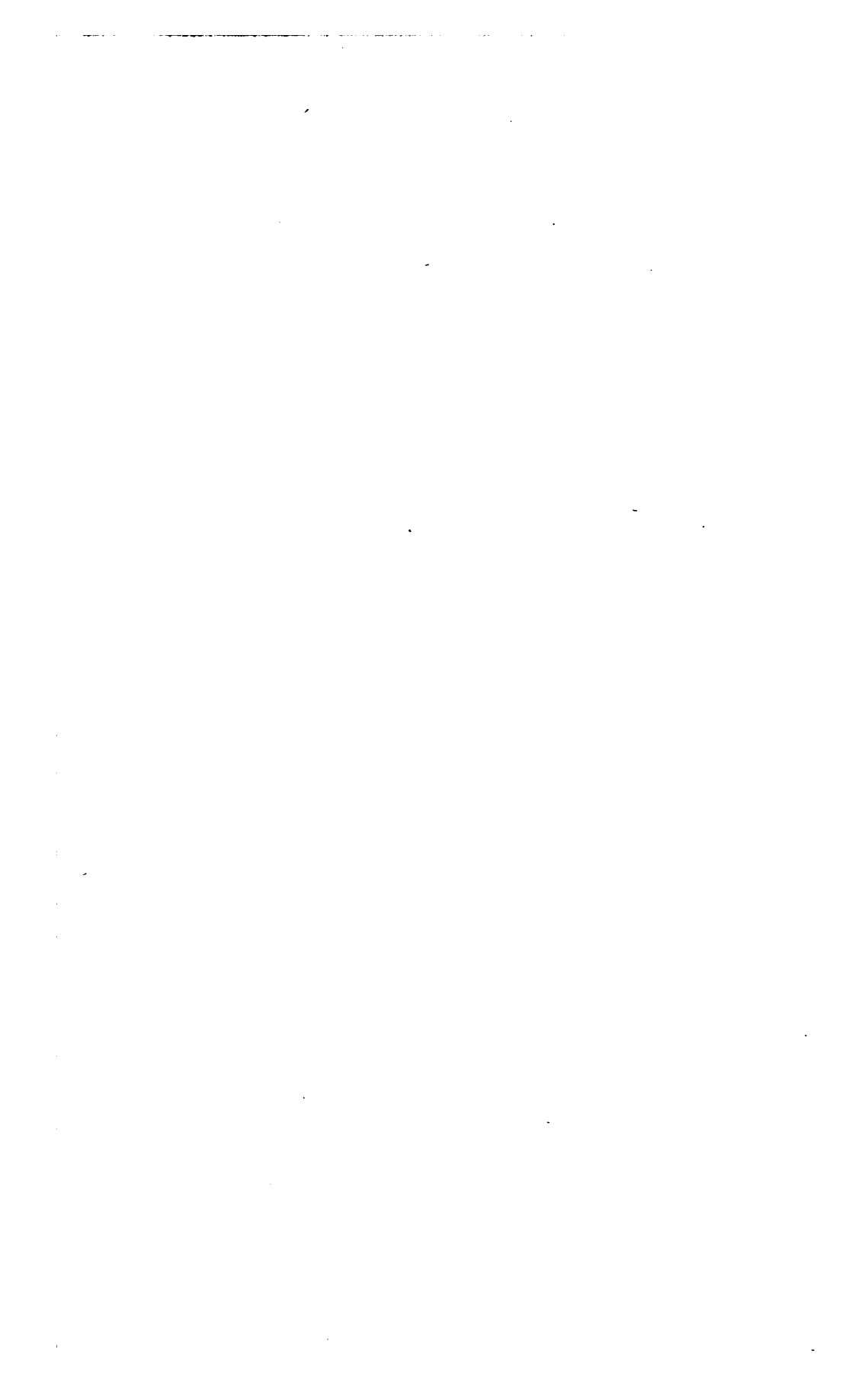
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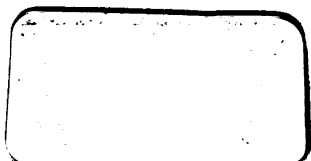
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A TREATISE
ON THE
LEGAL REMEDIES OF
Mandamus and Prohibition,
HABEAS CORPUS,
Certiorari, and Quo Warranto,

By HORACE G. WOOD.

WITH FORMS.

SECOND EDITION—REVISED AND ENLARGED.

By CHARLES F. BRIDGE, Esq.,
OF THE ALBANY BAR.

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PREFACE TO FIRST EDITION.

In this volume the author has sought to delineate the principles governing the courts in administering relief by the Legal Remedies of Mandamus and Prohibition, Habeas Corpus, Certiorari and Quo Warranto. In the prosecution of this object his labors have covered a field which has hitherto been but partially explored. It has been his aim to set forth the results of the most reliable English and American Decisions on the several subjects treated upon which have been gathered in many months of careful study and research of the cases which are referred to under the different heads.

In cases where the former New York Code is referred to the corresponding sections of the New Code are given. Where no reference to the New Code is given, it may be understood that the present Code makes no changes in the sections referred to in the old.

ALBANY, N. Y., *April* 20, 1880.

PREFACE TO SECOND EDITION.

At the time when this work was originally prepared by Mr. Wood, the courts were passing from the practice under the old Code to that under the new. Whether the change was a beneficial one or not still seems to be a question in the minds of many. That it was a decided change, no one will deny. The aim of this edition has been to conform the work to the present practice; to give all the changes in statutory law, as well as references to late cases in this and other States bearing upon the subject in hand, and, at the same time, to preserve, for the benefit of those accustomed to it, the arrangement and general scheme of the first edition. The work has been carefully done, all authorities have been verified, and it will, it is believed, be worthy of the generous reception accorded its predecessor.

CHARLES F. BRIDGE.

ALBANY, N. Y., Jan. 1st, 1891.

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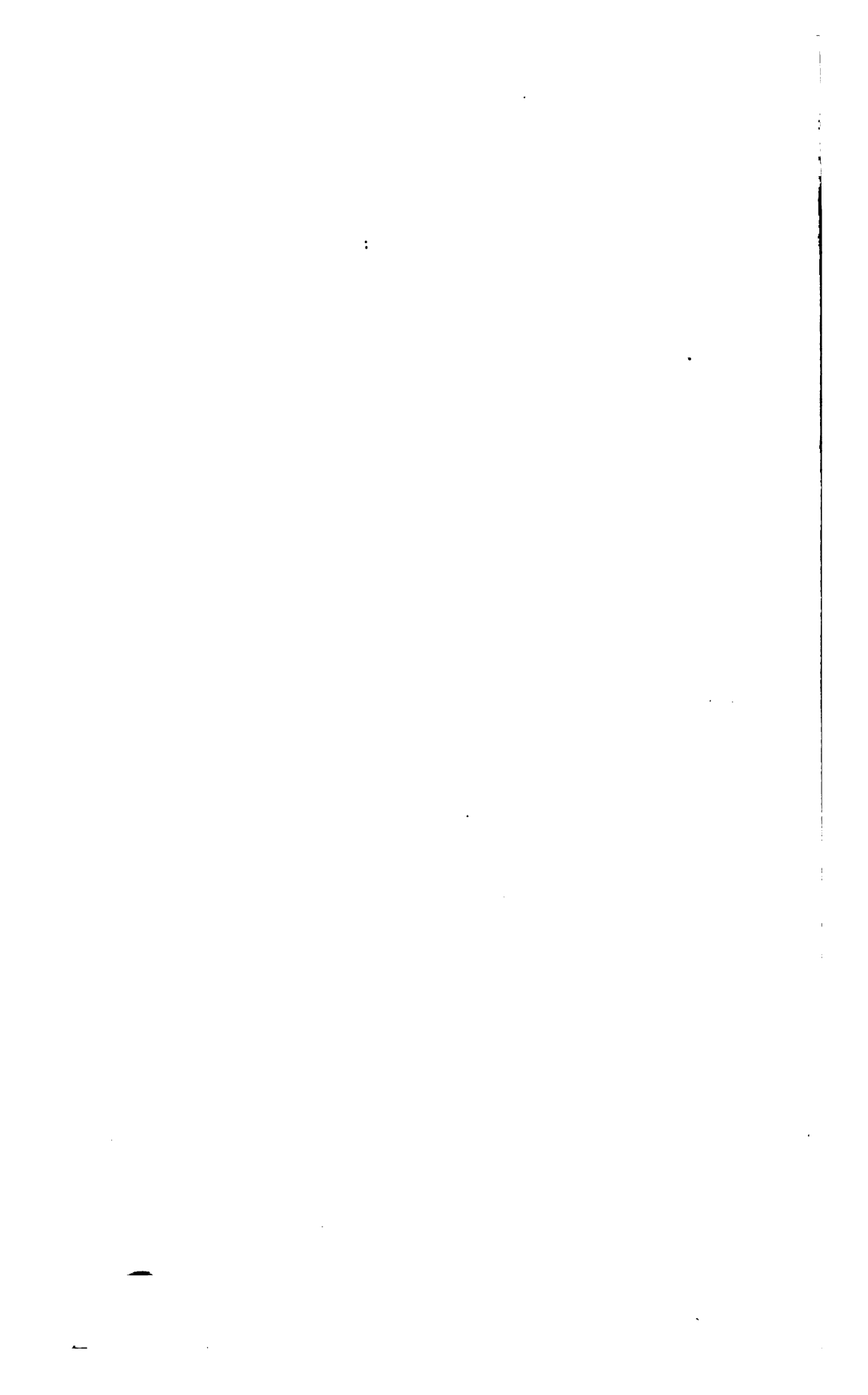
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CHAPTER I.

MANDAMUS AND PROHIBITION.

MANDAMUS.

General observations.

The writ of mandamus is a high prerogative writ, issued in the name of the people, by the Supreme Court, and directed to any person, corporation or inferior jurisdiction, within the state, requiring the doing of some particular thing therein specified, which pertains to the office or duty of such person, corporation or inferior jurisdiction, and which such court has previously determined, or at least supposed, to be consonant to right and justice.¹ This writ is issued or withheld in the discretion of the court, and the court, in issuing it, will be governed by what seems to be necessary and proper to be done in the premises, for the purposes of justice.²

It will not be issued in cases of *doubtful* right. The legal right of the party to that which he demands in the writ must be clearly established,³ and to entitle a party to this writ, it must appear that there is no other specific *legal remedy* to which he can resort for the enforcement of his right. Where the party has an adequate remedy by action, this writ will not be awarded,⁴ and it is granted

¹ See 3 Bl. Com., 110; 12 Wheat., 561; 2 Johns. Cas., 217, 2d ed., note; 14 Abb., 19.

² 4 Hill, 583; 15 Barb., 607; 27 N. Y., 378; 66 N. Y., 360, 606; 76 N. Y., 326; 68 N. Y., 467; 7 Weekly Dig., 411; 71 N. Y., 171; 72 N. Y., 496. But the exercise of a discretionary power may be compelled. 13 Barb., 206.

³ 11 N. Y., 563; 13 Barb., 444; 8 Pet., 291; 11 How. U. S. R., 272.

⁴ 10 How., 544; 6 Hill, 243; 25 Wend., 680; 11 N. Y., 563; 54 N. Y., 528; 2 Hill, 45; 46 N. Y., 9; 10 Johns., 484; 49 Barb., 259; 72 N. Y., 496; 107 N. Y., 235; 46 Hun, 296; 43 Hun, 463; 17 N. Y. St. Rep., 983.

only for *public* purposes to compel the performance of *public* duties,¹ and there must have been a neglect or a refusal to perform such duties, after a demand had been made for their performance.²

It will not be issued where it would be unavailing.— Thus, it is held that a mandamus should not be granted where it would be unavailing from a want of power in the defendants; for the court should refuse the writ if it be manifest that it would be vain and fruitless. Thus, a mandamus to compel a board of canvassers to do certain acts, after they had ceased to exist as a board, would be futile.³ The Supreme Court may interfere to control the action of a board of canvassers while they exist as a board; but it can be done only while such board has a legal existence.⁴ And where a mandamus is asked, it should appear that the defendants have it yet in their power to perform the duty required of them.⁵ Thus, a mandamus should not be issued to direct commissioners of excise to entertain the application of the petitioner after the board had met and completed the ten days limited in the act.⁶

This writ lies to compel the performance of ministerial acts, and is also addressed to subordinate judicial tribunals, requiring them to exercise their judicial functions by rendering some judgment in cases legally before them, where there would be a failure of justice from a delay or refusal to act. But there is this difference; with respect to judicial tribunals, they will require them to act, in giving judgments, etc., without assuming to determine what that action shall be, or to control such action; but in respect to ministerial action, it specifies the particular act to be done.⁷

¹ 2 Johns. Cas., 217, note; 3 Bl. Com., 110.

² 7 Lond. Jur., 233.

³ 12 Barb., 217; 11 How., 89; 15 Barb., 607.

⁴ *Supra*, and 16 Barb., 52.

⁵ 7 Abb., 34; 54 How. Pr., 1.

⁶ 3 Dall., 42; 13 Peters, 279, 404; 50 Super. Ct., 473; 7 Dowl. & Ryl., 334;
⁷ Halst., 57; 7 Id., 179.

Although a mandamus does not lie to *control* a discretionary power, yet it will compel the *exercise* of such power in cases where it legally exists, as, where an officer is invested with power, and is required to grant a license to the applicant, on his complying with certain conditions, to be determined by said officer, and the applicant has complied with the necessary conditions, but the officer refuses to grant the license, upon the ground that he has concluded to grant no licenses; in such case a mandamus will lie.¹

In general, the Supreme Court should not interfere by mandamus, with that portion of the practice of inferior courts, which does not depend upon established principles or is not regulated by fixed rules.²

Against whom, and when the writ will lie.

The writ, in proper cases, will lie against inferior courts, corporations and ministerial officers.

Against inferior courts.

This writ lies to set an *inferior court* in motion, where it refuses to act; but it will not require that court to come to any particular decision, or to retrace its steps where it has acted.³ Nor will it be granted where the court has acted judicially in making its decision, for the purpose of reviewing or correcting such decision,⁴ not even for the purpose of enabling the party applying to bring error.⁵ The writ of mandamus cannot be awarded for the correction of *judicial errors*.⁶ Nor has the court jurisdiction, by mandamus, to review the decisions of a subordinate court in a matter of which such subordinate court had judicial cognizance.⁷

¹ 13 Barb., 206; 1 Hill, 655; 19 Johns., 259; 12 Id., 414; 6 How., 81.

² 15 How., 385; 2 Id., 59; 5 Wend., 114.

³ 2 Denio, 192; 18 Wend., 79; 13 How., 277; 20 Wend., 658; 1 Halst., 157; 5 Id., 57; 2 Bibb., 573; 1 Hun, 252.

⁴ 20 Wend., 658.

⁵ 2 Denio, 191.

⁶ 20 Wend., 659.

⁷ 18 Wend., 79; 10 Pick., 244; 13 Pet., 279, 404.

To raise the question whether a judge improperly refused to enter an order embodying his decision denying a stay, the proper remedy is an alternative mandamus.¹

When the writ is directed to judicial officers, its mandate is that they proceed—adjudicate—exercise a discretion upon a particular subject. It will direct the judge or court *to proceed to render judgment, but will not direct what judgment shall be rendered.*² Thus the court, by mandamus, will require a subordinate court to settle a case after the denial of a motion to set aside the report of a referee, so as to enable the party to bring error; but it will not direct *what facts shall be inserted in the case.*³ So the Supreme Court will require an inferior court to proceed in the exercise of its judicial discretion, but it will not attempt to control that discretion.⁴

As this writ will not lie to control or direct the *discretion* of the court, it will not be allowed to compel a subordinate court to grant a new trial upon the merits;⁵ nor to vacate a rule granting an amendment in any case within the power of the court;⁶ nor to vacate a rule setting aside a regular default and permitting the defendant to plead, on payment of costs;⁷ nor, generally, will it be granted for the purpose of controlling the practice in other courts.⁸

But this writ will be granted for the purpose of compelling an inferior court to do some act belonging to its duty. Thus, it will compel an inferior court to give judgment, in order that an appeal may be brought;⁹ or will compel a justice of the peace to issue an execution upon a judg-

¹ 9 Abb. N. C., 448.

² 20 Pick., 484; 13 Pct., 279, 404; 7 Dowl. & Ryl., 334; 104 N. Y., 96; 49 Hun, 425.

³ 20 Wend., 668.

⁴ 19 Johns., 260; 18 Wend., 92; 12 Barb., 446.

⁵ 2 Cow., 479.

⁶ 16 Wend., 617. 20 Id., 658.

⁷ 6 Cow., 392.

⁸ 16 How., 200; 15 Id., 392.

⁹ 2 Johns. Cas., 215.

ment rendered by him;¹ or a court of sessions to enter judgment on a verdict where the court had no power to grant a new trial;² or to settle a case after denial of a motion to set aside the report of a referee, so as to enable the party to appeal,³ or to compel a surrogate to decide that portion of a controversy submitted to him.

This writ will not be granted to be directed to a court acting under a special commission, which had expired by its own limitation prior to the application for the writ.⁴

A mandamus will not lie to the Common Pleas, to correct the taxation of a bill of costs in items dependent, in a measure, upon discretion; thus, how many folios should be disregarded as unnecessary;⁵ nor will it lie to review the determination of a question of fact on the weight of evidence, as an order setting aside the report of referees.⁶

Against corporations.

This writ also lies against corporations, to compel them to perform the duties which the law imposes upon them, as to compel a corporation and its officers to exhibit the stock book to a stockholder,⁷ but upon a refusal of the officers of a corporation to allow a stockholder to inspect a stock book, it is doubted whether a proceeding for a mandamus to allow inspection can be maintained against the corporation itself.⁸ A demand upon the corporate officers to see the stock book is insufficient to found a proceeding for a mandamus to allow inspection if it is made, not by the relator in person, but by his attorneys at law.⁹ It, however, lies only in those cases where the

¹ 2 How., 109.

² 1 Johns. Cas., 179.

³ 20 Wend., 663.

⁴ 10 Wend., 692.

⁵ 19 Id., 113.

⁶ 19 Wend., 68.

⁷ 68 N. Y., 30; 20 Abb. N. C., 132.

⁸ 20 Abb. N. C., 192.

⁹ Id.

party has not an adequate remedy by action;¹ as, where a corporation improperly refuses to transfer stock; the party has an ample, though not a specific, remedy by action, and for that reason a mandamus will not lie.² The courts can compel corporate action by mandamus only when the duty concerned is specific and plainly imposed upon the corporation.³ It will not lie against a municipal corporation to compel it to file and confirm an assessment of damages for the laying out of a street. If the relator's rights are vested, he should sue in assumpsit for the money, or in case, for the refusal to proceed.⁴ A telephone company, incorporated for the purpose of transmitting messages by telephone, is a public servant and cannot so use the invention as to withhold from one citizen the use which it accords to another; and it may be compelled by mandamus to place one of its telephones in the relator's office for use, on compliance with its usual terms and reasonable regulations.⁵ When a railroad corporation neglects or refuses to receive and transport and deliver freight to the injury of a large number of citizens, and for a considerable length of time, it may be compelled by mandamus to resume the duties of a carrier of goods offered for transportation; that is, to receive, carry and deliver the same under the existing rules and regulations as the business had been accustomed to be done.⁶ Mandamus is the proper remedy to restore a person to membership in a corporation founded under the statutes of this state, for benevolent purposes.⁷ The general rule applicable in these cases is, that a mandamus will lie only to enforce a clear legal right, where a remedy at law is either wanting or doubtful.⁸

¹ 2 Cow., 444; 1 Wend., 318.

² 6 Hill, 243; 20 Wend., 91; 22 Id., 348; 10 John., 484.

³ 104 N. Y., 58.

⁴ 1 Wend., 318.

⁵ 19 Abb. N. C., 466.

⁶ 28 Hun, 543.

⁷ 3 Hun, 361.

⁸ 2 N. Y., 490; 11 Id., 563; 5 Metc., 73; 25 Barb., 73.

Although it is a general rule that a mandamus will not be granted where the applicant has a legal remedy, but in cases of corporations and ministerial officers, they may perhaps be compelled by mandamus to exercise their functions according to law, notwithstanding they may be liable to an action for refusal.¹

Against officers.

Where subordinate public agents refuse to act, or entertain a question for their discretion in cases where the law enjoins them to do the act required by law, the court may enforce obedience to the law by mandamus, where no other remedy exists.² As, where the supervisors of a county refuse to allow a claim, on the ground that it is not a county charge, when by law it is such charge, a mandamus lies to compel them to admit it as such, and to exercise their discretion as to the amount to be allowed.³ But if their discretion extended to allowing or rejecting the claim, a mandamus would not lie to compel such allowance.⁴

As against corporations and ministerial officers, a mandamus may be granted not only requiring them to proceed in the discharge of their duty, but also directing the manner in which they shall act, and, specifically, what they shall do.⁵ Thus a writ has been allowed to compel supervisors of a county to allow the expenses of a county clerk incurred by him according to law.⁶ So, also, to compel them to restore the names of certain banks which have been stricken from the assessment roll as made by the assessors.⁷ Also, to issue warrants for the military commutation; and, being neglected at their annual meeting,

¹ 2 Barb., 397; but see 11 N. Y., 563.

² 6 How., 81; 19 John., 259; 1 Cow., 417.

³ 19 Johns., 259; 1 Hill, 50; 68 N. Y., 114; 53 Hun, 254; 79 N. Y., 189.

⁴ 25 Wend., 692.

⁵ 20 Wend., 658; 19 Johns., 263; 13 How., 277.

⁶ 18 Johns., 242; 1 How., 163.

⁷ 4 Hill, 20.

they have been compelled to meet again and perform that duty.¹

Also, a board of supervisors, having allowed a county treasurer, as compensation for payment of the State tax to the State treasurer, more than the amount allowed by law, may be compelled by mandamus, issued on application of a taxpayer, to revoke the audit as to the excess.²

Mandamus is also the appropriate remedy by which supervisors are compelled to levy and collect money which, by statute, is made a county charge;³ or levy and collect the amount of damages sustained by the owners of land taken for the improvement of a public highway.⁴ But it will not lie to compel them to allow the compensation of a district attorney for his services on *certiorari* in a criminal case, which has been certified by a justice of the peace. Because, if they have a discretion as to its allowance, it cannot be controlled; if not, that is if the certificate is conclusive, the remedy is by action.⁵ Mandamus is also the proper remedy to compel the board of supervisors of the city and county of New York to reduce a tax imposed on the real property of the plaintiff, on the ground that the valuation of the land was too high. The rule laid down is, that where a specific duty is imposed on the supervisors, or any other public officer, by statute, and they do not conform to the statute, and the omission to conform affects a particular party only, and not the whole assessment list, a mandamus will issue to compel such officers, etc.⁶

No officer or appointing power has authority to deny the statutory preference in appointment to public office, given to honorably discharged soldiers and sailors of the

¹ 8 N. Y., 318.

² 73 N. Y., 173.

³ 10 Wend., 363.

⁴ 4 Barb., 64.

⁵ 14 Barb., 52.

⁶ 12 How., 224; 19 Johns., 259; 1 Hill, 362; 4 Paige, 399; 10 Wend., 393; 18 Id., 659; 70 N. Y., 228.

late war, and a mandamus will lie to enforce the observance of this preference.¹

Commissioners of highways may be compelled by mandamus to discharge their duties.² But a mandamus should not be resorted to to compel them to open a highway, when its necessary effect would be to subject them to an action of trespass.³

Where the duty to be performed by the commissioner is *judicial*, they may be compelled, by mandamus, to meet and decide on the matter, but cannot be controlled as to the manner in which they shall decide; where the duty is ministerial, they may be compelled to do the act which they are charged with unlawfully refusing to do.⁴

It is well-settled, that where the commissioners have a discretion in the performance of their duty, and proceed to exercise it, that discretion cannot be controlled by mandamus. But if they refuse to act or entertain the question for their discretion in cases where the law enjoins upon them to do the act required, the court may enforce obedience to the law by mandamus, where no other legal remedy exists.⁵

So a mandamus lies to compel the supervisors and overseers of the poor of towns, created by a division of a former town, to make an apportionment of the expenses of paupers, who were omitted by them in the division of paupers, unless they had acted on the case, and adjudged the persons in question, not to be paupers.⁶ So a mandamus was granted where a judge of the County Court omitted to file his decision in a case for more than twenty days after the court at which the trial took place.⁷ So it

¹ 22 Abb. N. C., 137; S. C., 2 N. Y. Supp., 324.

² 19 Wend., 56; 1 Cow., 23; 4 Supr. Ct., 398; 109 N. Y., 69; 4 Cow., 554.

³ 27 Barb., 94; 9 Hill, 458.

⁴ 30 How. Pr., 78; 42 Hun, 463.

⁵ 18 Wend., 79; 27 N. Y., 378; 33 Id., 332.

⁶ 2 Cow., 485.

⁷ 5 How., 47.

is the proper remedy to compel the proper officer to administer the oath of office to a party entitled to enter upon an office.¹ It is the appropriate remedy to compel a county treasurer to pay, when he refuses to pay a demand, legally audited and allowed by the board of supervisors and directed to be paid.² But it will not be awarded to compel him to pay a demand, not a legal charge against the county, although it has been allowed by the supervisors.³ Mandamus does not lie to compel an officer to do an act in respect to which he may exercise judgment or discretion.⁴ An officer appointed by the board of police of New York city may compel the board by mandamus to order its treasurer to draw upon the comptroller for his salary; and it is no defense for such board that the comptroller may have no funds subject to its requisition, since this proceeding seems the proper course to be taken preliminary to an action against the city.⁵

This writ is allowable whenever a party has a legal right, and is entitled to a specific remedy to enforce it, and a public officer whose duty it is to afford that remedy, refuses to afford it. Thus it will lie to compel the clerk of an inferior court to issue an execution on a judgment which an Appellate Court, without jurisdiction, assumed to reverse.⁶ But when the question is one of irregularity and not of jurisdiction, the irregularity will be waived by arguing the appeal on its merits, and a mandamus will not lie.⁷

A mandamus will also be awarded to compel the attorney-general to give a certificate that a suit was duly instituted as required by law, when such certificate is necessary in order to collect costs against the state.⁸

¹ 4 Abb., 35; 3 Hill, 42.

² 19 Barb., 468.

³ 23 Barb., 340; see 6 Hill, 244.

⁴ 74 N. Y., 443.

⁵ 66 N. Y., 585; 75 N. Y., 38.

⁶ 3 Abb., 309; 13 How., 260; 2 How., 109.

⁷ 16 How., 199

⁸ 17 How., 10.

The performance of an official duty, not limited in respect to the particular person holding the office, or the time of performance, may be enforced by mandamus, notwithstanding the term of office is about to expire.¹ Where it appears that work authorized by law to be done at the expense of a municipal corporation, who are to collect such expense from the taxpayers, has been done, and all the requirements of the statute have been complied with, the money to be paid on the part of the city, has been collected and paid into the city treasury, the city auditor has certified to the justice of the claimant's demand therefor, and the comptroller has drawn his warrant in the claimant's favor, a peremptory mandamus will issue to compel the mayor to countersign the warrant.² And the mandamus may be awarded requiring the sheriff to execute a deed, even where he has already executed one to a third person, who has conveyed the premises to a *bona fide* purchaser. The sheriff must do his duty, although the act be inconsistent with what he had previously done.³ Mandamus does not lie to compel the attorney-general to bring *quo warranto*.⁴

This writ is sometimes resorted to for the purpose of restoring an individual to an office, where he has been illegally deprived of the possession thereof.⁵ But the court will not grant a mandamus to admit a person to an office, where the office is already filled by another person, who has been admitted and sworn and is in by color of right.⁶ Says Justice S. B. STRONG: 1. "A mandamus is inappropriate where there is a real and substantial dispute as to the title to an office; 2. Where the right of the applicant is clear and unquestionable, and the possession of the books and papers is all that is necessary to enable him to perform fully and satisfac-

¹ 19 Wend., 56.

² 10 Wend., 363; 24 N. Y., 114; 16 Abb. Pr., N. S., 219.

³ 2 N. Y., 484.

⁴ 22 Barb., 114; 67 N. Y., 334.

⁵ 2 Johns. Cas., 217.

⁶ 3 Johns. Cas., 79; 20 Barb., 302.

torily the duties of the office, a resort to the summary process of the court given by statute to obtain such books, etc., renders a mandamus unnecessary. But when the title to the office is indisputable, and the objection thereto is wholly frivolous, and the books and papers would not give him the entire control of the office, the remedy by the proceedings substituted by the Code for the writ of *quo warranto* would, in many cases, be so dilatory as to amount to a failure of justice; and that in such cases a mandamus would be proper and should be awarded.'''

Against private persons and officers of corporations.

When a director of a bank is deprived of his right to inspect the books of the bank, he may have a mandamus to enforce his right,' and the writ may be directed to the cashier, he having charge of the books. So the secretary of a turnpike corporation may be compelled by mandamus to allow the relator, or a director of the company, to examine the books of the corporation.'

When there is a right to execute an office, perform a service, or exercise a franchise, and especially if it be a public concern, and attended with profit, and a person is kept out of possession, or dispossessed of such right, and has no other specific legal remedy, the court ought to assist by mandamus.¹ Thus, a mandamus lies to compel trustees of a religious corporation to induct a pastor regularly appointed by the proper ecclesiastical authority.² So, also, to compel a medical society to restore a party to membership when he had been illegally expelled.³ So, also, to compel hospital officers to correct

¹ 7 How., 128.

² *Supra*, and 12 Wend., 183.

³ 1 How., 247.

⁴ 7 How., 124; 3 Barb., 397.

⁵ *Id.*; 3 Burr., 1265.

⁶ 24 Barb., 570.

a certificate of death of a patient, which they have filed with the state board of health.¹

The writ of mandamus and the proceedings thereon.

The proceedings will be for a peremptory mandamus, an alternative mandamus, or an order to show cause, which is in the nature of an alternative mandamus.

A writ of mandamus is either alternative or peremptory. The alternative writ may be granted upon an affidavit, or other written proof, showing a proper case therefor; and either with or without previous notice of the application, as the court thinks proper.²

A peremptory writ of mandamus may be issued, in the first instance, where the applicant's right to the mandamus depends only upon questions of law, and notice of the application has been given to a judge of the court, or to the corporation, board, or other body, officer, or other person, to which or to whom it is directed. The notice must be served, at least eight days before the application is heard; unless a shorter time is prescribed by an order to show cause, made, where the application is to the special term, by the court, or a judge thereof; or, where the application is to the general term, by the general term or a general term justice, of that judicial department. In such a case, the application must be founded upon affidavits, or other written proofs, a copy of which must be served with the notice, or order to show cause. Where the court, board, or other body to be served, consists of three or more members, the notice or order to show cause, and the papers upon which the application is to be made, may be served, as prescribed in the next section for service of an alternative writ of mandamus. Except as prescribed in this section, or by special provision of law, a peremptory mandamus cannot be issued, until an alternative mandamus has been

¹ 8 Abb. N. C., 332.

² Code of Civ. Pro., § 2067; 19 St. Rep., 24; 20 St. Rep., 268; 16 Civ. Pro., 83.

issued and duly served, and the return day thereof has elapsed.¹

Where the facts, on which the applicant relies, are in dispute, an alternative mandamus issues. The alternative mandamus brings the questions to be decided, before the court, by a statement of the facts upon which the application for relief is founded, and the return of the defendant made upon such writ, either admitting, or denying such statement, or confessing and avoiding the same.

The usual practice is to grant an order to show cause instead of issuing an alternative mandamus, especially when the application is to compel the performance of an act by a subordinate court.² In such case the questions arising upon the application are discussed upon affidavits, and no formal judgment is given. Formerly the only practical difference between the proceeding upon an order to show cause, and an alternative mandamus, was, that in the former case the decision of the court was final; while in the latter case the decision might be reviewed.³ But as the law now stands, either party may appeal from the decision of the court made at special term on an order to show cause. Substantially the same end was accomplished under the former practice on an order to show cause; for the court on application of either party, permitted the alternative mandamus to issue, and a formal record to be made up, on which the party desiring might have the case reviewed.⁴

But generally, whether the proceeding is by obtaining, in the first instance an alternative writ, or an order to show cause, the defendant should in every instance, before a peremptory mandamus is awarded against him, have the

¹ Code Civ. Pro., § 2070; 55 N. Y., 180. 64 Id., 600; 7 Cow., 526; 89 Barb., 522; 20 How. Pr., 206; 1 Johns., 64; 73 N. Y., 173; 52 How., 140; 71 N. Y., 171; 45 Id., 196; 27 Id., 378; 12 Wend., 183; 5 Week. Dig., 538; 4 Abb., 35; 20 Abb. N. C., 143.

² 10 Wend., 30; 9 Id., 472; 2 Johns. Cas., 68; 3 How., 164.

³ 3 How., 165; 10 Wend., 30.

⁴ 12 Wend., 183; 19 Id., 31; 20 Barb., 86.

usual time allowed upon other motions, to present his defense. No motion, which in its operation is to have the effect of a final judgment, ought to be granted without giving the party against whom it is made an opportunity of being heard.¹

The application for the writ—affidavit.

The application for the writ of mandamus is based upon affidavits or other written proof stating the facts upon which the applicant relies for relief, and showing that he is entitled thereto,² and where the matter relates to private or corporate rights, such facts should also be stated as to show the title of the relator, otherwise a stranger might obtain a mandamus officiously, and for purposes not desirable to the real party.³ Thus, an affidavit for an order to show cause, why a mandamus should not issue to compel a court to restore an attorney to his office, should show that the court below acted improperly, or that the charge against the attorney was founded in error.⁴ The facts should be set forth with precision, so that an indictment for perjury could be maintained upon them if false,⁵ and they should anticipate and answer every possible objection or argument in fact which it may be expected will be urged against the claim.⁶ Thus it should show a default on the part of the court, corporation or individual proceeded against, as, that the applicant had applied to the defendant to do the thing which he requires the court to command him to perform, and that there was a refusal or neglect on his part to do the same.⁷ It must show that the applicant is legally and equitably entitled to some right properly the subject of the writ, and that it is legally demanda-

¹ 3 How., 164; 15 Johns., 537.

² 1 Johns. Cas., 134; Code Civ. Pro., § 2067.

³ 19 Wend., 56; 1 How., 186.

⁴ 1 Johns. Cas., 134; 3 Term R., 575.

⁵ 5 Term R., 466.

⁶ See 2 Johns. Cas., 217, 63, note.

⁷ 1 Term R., 403; 2 Id., 334.

ble from the party to whom the writ is directed, and whatever is required to be done by the applicant as a condition precedent to the right demanded, must be shown to have been performed.¹ It should show that the applicant had complied with everything necessary to constitute his right,² and entitle him to the relief he prays.³

In an affidavit, as a foundation for a mandamus to compel an admission or restoration to an office, the nature of the office, its duties and other facts to show that it is of a public nature, should be stated;⁴ and where it is by charter, the substance, as applicable, should be stated therein.⁵ So likewise, the election and other circumstances, under which the applicant claimed and still claims to be admitted, must be distinctly stated, and shown to have been according to the charter, etc.⁶ A deficiency in the affidavit of the applicant is sometimes cured by statements in the affidavit of the defendant; for the court will grant the writ whenever the proper case is made out.⁷

It is held that the affidavit should not be entitled in the court where the application is made, and the reason assigned is, that there is no cause pending of which it could be entitled;⁸ and an indictment for perjury in making such an affidavit must fail, as it could not be shown that such a cause existed in the court in which the affidavit was made.⁹ But if the entitling be such only as is fairly descriptive of the case, it will not come within such rule.⁹

Except where special provision therefor is otherwise

¹ 72 N. Y., 396; 66 N. Y., 606; 71 N. Y., 171.

² Bull N. P., 201.

³ East., 345; 2 N. Y., 490.

⁴ 1 Chit. Gen. Pr., 808.

⁵ Bull. N. P., 200.

⁶ 3 Term R., 596; 3 Steph. N. P., 2319; 2 Johns. Cas., 217, note 63.

⁷ 2 Johns., 371.

⁸ 1 Wend., 291.

⁹ See 6 Cow., 61.

made in this article, a writ of mandamus can be granted only at a special term of the court. In the Supreme Court the special term must be one held within the judicial district, embracing the county, wherein an issue of fact, joined upon an alternative writ of mandamus, is triable, as prescribed in this article.¹

A writ of mandamus may be granted, at a general term of the supreme court only, directed generally to any judge holding, or to hold, a special term of the same court, or directed to one or more judges of the same court, named therein, in any case where such a writ may be issued out of the supreme court, directed to any other court, or to a judge thereof. Such a writ can be granted only at the general term of the judicial department, embracing the county, wherein the action is triable, or the special proceeding is brought, in the course of which the matter sought to be enforced by the mandamus originated, unless that general term is not in session; in which case, it may be granted at the general term of an adjoining judicial department.² After the defendants have made and filed a return to an alternative mandamus, it will be too late for them to object to the form of the writ, or that it is not made returnable at at special term.³

This application may be made *ex parte*, but the relator may (and in many cases it is the better practice), instead of applying for an order to show cause, or making an *ex parte* application for an alternative writ, give the ordinary notice of motion, upon the affidavits, that a writ of mandamus will be applied for when the motion comes on to be heard; if material facts appear to be in dispute between the parties, an alternative writ may be allowed, which will lead to the forming of an issue to be

¹ Code Civ. Pro., § 2068; 50 Hun, 479; 22 Abb. N. C., 148; Rule 38; 2 Abb. N. S., 78; 19 St. Rep., 24; 20 Id., 268.

² Code Civ. Pro., § 2069.

³ 11 How., 89.

tried by jury, as will be hereafter shown; if there is no material fact in dispute, the court can at once grant or deny the peremptory writ, thus at once disposing of the questions of law, and making an order thereon that can be reviewed in the general term and Court of Appeals.

Order granting writ. If the court decides to allow the writ, an order granting it should be prepared and entered in the county where the proceeding is instituted. The order should set forth substantially what the writ allowed may command the defendants to do.

The alternative mandamus.

The alternative mandamus is issued in the name of the people of the state of New York, and is directed to the one who, by law, is obliged to execute it, or do the thing required to be done. It recites briefly the facts which precede the injury complained of, and upon which it is based; it then states the proceeding complained of, as stated in the complaint of the relator; it then proceeds to order or command the defendant that he act in the premises, or that he do the particular thing required to be done, substantially according to the order of the court allowing the issuing of the writ, or that he show cause to the contrary thereof, before the Supreme Court or a Superior Court¹ at the next special term thereof, to be holden, etc., and also that he return in what manner he executed the writ, etc.

This writ is in the nature of a declaration, and must state a good title in substance.² The relator is bound to set forth therein sufficient facts to entitle him to the relief he claims.³ The reason is, that if the material facts on which the relator founds his claim are not stated in the writ, the defendant is deprived of the power of traversing them, for he can only traverse what is stated in the writ.⁴ But the most cogent reason is, the process is

¹ 58 N. Y., 245.

² 2 N. Y., 490.

³ 10 Wend., 25; 21 Hun, 184; 58 How., 55; 25 Hun, 179.

⁴ 3 Barn. & Ald., 221.

considered as a declaration, and the relator, the actual plaintiff; and the familiar rule that he must succeed, if at all, upon the strength of his own allegation, is applicable. Thus, where the controversy arises upon a demurrer to the defendant's return, it is competent for the defendant to avail himself of any material objection to the writ, agreeably to the established rule, that the party committing the first error in substance, in pleading, must fail on a general demurrer.¹

Thus, where the relator sets forth in the alternative mandamus, that he has acquired the rights of the original purchaser at sheriff sale, first as assignee, and, secondly as a subsequent judgment creditor, it will be a fatal objection to his claim as assignee, that he has not filed the assignment to him, in the office of the clerk of the county in which the real estate sold is situated. So, also, where he claims in the character of a redeeming judgment creditor, it must appear that he has presented to, and left with, such purchaser or officer who made the sale, a copy of the docket of his judgment, a copy of the assignment of it, if any, duly verified, and an affidavit of the amount due at the time, etc. Without this, he had no right to acquire the title of the original purchaser.²

The title of the relator must be clearly and distinctly stated in the alternative mandamus, so that the facts stated may be admitted or traversed. It is not enough to refer in the writ to the affidavits and other papers on file, in which the order for the mandamus was made, although such reference may be made to show the *amount* of the money claimed, but not the *right* of the relator thereto.³

Where the writ enjoins the performance of a duty, it should set out the duty to be performed,⁴ although it

¹ 2 N. Y., 492.

² 2 N. Y., 493.

³ 7 Term R., 52; 7 East., 345; 25 Wend., 32; 10 Wend., 25; 15 Barb., 607.

⁴ Per LEE, Ch. J., Sayre, 37.

need not set out by what authority the duty exists.¹ So, in commanding a person to undertake an office, it is sufficient to show the *general liability* of the defendant to serve, and to allege that he was elected, and, without reasonable cause, refused to undertake the office; but it need not be averred that he was *able* and *fit* to serve.²

If the object of the writ is the production of records, a general description thereof will be sufficient.³ And so an alternative mandamus to a court of Common Pleas, commanding it to seal a bill of exceptions, need not set forth such bill; it may be served by copy, at the same time showing the original.⁴

This writ is tested, signed and sealed in the usual manner, although not a process within the meaning of the statute regulating the test and return of process.⁵

To whom directed.

The writ must be directed to the one whose legal duty requires him to execute it, or do the thing required to be done. If the direction of the writ include any who are not authorized to act in the premises, it will be bad; as, where it was directed to the mayor and clerk of Hereford, when in fact the mayor only was authorized to act.⁶ And for a similar reason, the same writ of mandamus cannot be directed to the township committees of two several townships, to compel them to proceed to do their duty in a matter of a road.⁷

Where the mandamus was sued out to commissioners of highways, to require them to act as such commissioners, it was held that in the first instance it need not be directed to them by their individual names, it being

¹ Str., 897.

² 2 Lev., 200.

³ 1 Lid., 81; 3 Steph. N. P., 2321, 2322.

⁴ 4 Cow., 73.

⁵ Code Civ. Pro., §§ 22, 23; 13 Wend., 649, 655, note; 3 How., 164; 1 Hun, 464.

⁶ 2 Salk., 699, 701; 2 M. & S., 598; 5 Abb., 241.

⁷ 5 Halst., 292.

only in case of disobedience to the writ, they were liable to be proceeded against individually.¹

Where the writ is directed to a corporation or a select body, it must be directed to them in their proper name, and also in their proper capacity, and the application should state in what capacity it is intended the writ should be directed to them.² Thus, the direction of a writ to the members of a town council should be by their corporate name, for that is their legal description as long as they continue to have a corporate existence.³

Where the chairman of a board of supervisors illegally declares a resolution lost because it lacked a two-thirds vote, and it is so recorded, a mandamus may be directed to him and the clerk, requiring them to convene the board, and the chairman to declare the resolution carried and the clerk to so record it. The mandamus might be directed to the board, but it is not necessary.⁴

How served.

An alternative writ of mandamus must be served by showing the original writ, and delivering a copy thereof, to the person to be served. Where it is directed to a court, or to the judge or judges of a court, it must be served, either in term time or in vacation, upon the judge or judges of the court; except that where the court consists of three or more judges, service upon a majority of them is sufficient. Where it is to be served upon a board or body, other than a corporation, service must be made upon a majority of the members thereof, unless the board or body was created by law, and has a chairman or other presiding officer, appointed pursuant to law; in which case, service upon him is sufficient. Where the writ is to be served upon a corporation, service thereof may be made upon any officer, upon whom

¹ 16 Johns., 61.

² 2 Johns. Cas., 217, 65, note; 3 Barn. & Cres., 685.

³ 2 M. & S., 598; 1 Ld. Raym., 559.

⁴ 68 N. Y., 259. See, also, 3 Hun, 214.

a summons, issued out of the Supreme Court, may be served. Where one or more of the persons, upon whom to make service, as prescribed in this section, cannot, after due diligence, be found, the exhibition of the original writ may be dispensed with, and service may be made upon him or them, as prescribed by law for the service of a summons, issued out of the Supreme Court.¹

An alternative writ must be made returnable twenty days after the service thereof, at the office of the clerk of the court, or, in the supreme court, the clerk of the county, designated therein, in which an issue of fact joined thereupon is triable. A peremptory writ must be made returnable at a general or a special term, designated therein, to which application for the alternative writ might have been made.²

When it may be amended.

The writ being in the nature of a declaration, it may be amended at any time before it is returnable.³ But amendments will not be allowed after the return, especially where the return has been traversed.⁴ The Code, however, provides that the court in which any action shall be pending, shall have power to amend any process, pleading or proceeding in such action, either in form or in substance, for the furtherance of justice, and this provision is made applicable to all writs of mandamus and prohibition.⁵

Motion to quash or set aside the writ. Demurrer.

An alternative writ of mandamus cannot be quashed or set aside upon motion, for any matter involving the merits. A motion to set aside such a writ, for any other

¹ Code Civ. Pro., § 2071.

² Code Civ. Pro., § 2072.

³ 6 Mod., 133.

⁴ 4 Term R., 689; 5 Abb., 241.

⁵ Code Civ. Pro., § 2080.

cause, or to set aside or quash a peremptory writ of mandamus, or to set aside the service of either writ, must be made at a term, whereat the writ might have been granted.¹

The statement, contained in an alternative writ of mandamus, of the facts constituting the grievance, to redress which it is issued; the joinder therein of two or more such grievances; and the command of the writ, are subject to the provisions of chapter sixth of this act, respecting the statement, in a complaint, of the facts constituting a cause of action; the joinder therein of two or more causes of action; and the demand of judgment thereupon. The person, upon whom the writ is served, instead of making a return thereto, may file in the office where the writ is returnable, a demurrer to the writ; or he may file a demurrer to a complete statement of facts contained in the writ, as constituting a separate grievance, and make a return to the remainder of the writ. A demurrer may be thus taken, in a case where a defendant may demur to a complaint, or to a cause of action separately stated in a complaint, as prescribed in chapter sixth of this act; and it must be in like form.*

Where a return to an alternative writ of mandamus has been filed, the attorney for the defendant making it must serve, upon the attorney for the people or the relator, a notice of the filing thereof. Where the people or the relator demur to the return, or to a part thereof, a copy of the demurrer must be served upon the attorney for the defendant, within twenty days after the service of such a notice. Where the defendant demurs to the writ, or to a part thereof, a copy of the demurrer must be served upon the attorney for the people or the relator, within the time prescribed by law for filing it.*

Where the defendant desires further time to make his return, he must apply to the supreme court or to a jus-

¹ Code Civ. Pro., § 2075; 50 Hun, 105; 19 St. Rep., 24; 85 N. Y., 323.

* Code Civ. Pro., § 2076.

² 1 Code Civ. Pro., § 2081.

tice thereof for an order enlarging the time. This the court has power to grant, the same as in personal actions. It is merely asking for further time to answer the complaint or writ.

The proceedings upon a writ of mandamus, granted at a special term, may be stayed, and the time for making a return, or for doing any other act thereupon, as prescribed in this article, may be enlarged, as in an action, by an order made by a judge of the court, but not by any other officer. Where the writ was granted at the general term, an order staying the proceedings, or enlarging the time to make a return, can be made only by a general term justice of the same department; and where notice has been given of an application for a mandamus at a general term, or an order has been made to show cause, at a general term, why a mandamus should not issue, a stay of proceedings shall not be granted, before the hearing, by any court or judge.¹

Where the first writ of mandamus has been duly served, a return must be made to the same, as therein required, unless it is an alternative writ, and a demurrer thereto is taken. In default of a return, the person or persons, upon whom the writ was served, may be punished, upon the application of the people, or of the relator, for a contempt of court.²

This branch of the proceedings differ somewhat from the ordinary proceeding in an action. If the defendant is in default of an answer, his default is taken, and judgment entered thereon. But in these proceedings there is something usually required to be done; and the proceeding is designed to put the defendant in motion; therefore, if he fails or neglects to obey the mandate of the writ, he is to be proceeded against as for a contempt.

The attachment in such cases is granted against those particular persons who refuse to obey the writ, even when the mandamus was directed to a corporation; and

¹ Code Civ. Pro., § 2089; 3 How., 164; 4 Cow., 73.

² Code Civ. Pro., § 2073.

when it is directed against several defendants in their natural capacity, the attachment will issue against them all, if they neglect or refuse to obey the writ. The members of a town council, or of the common council, may render themselves personally liable as for contempt, by their efforts to evade the force of the writ.¹

The return of the writ.

The return to an alternative writ of mandamus must be annexed to a copy of the writ ; and must be filed, in the office of the clerk, where it is returnable, within the time specified in the writ. The return to a peremptory writ of mandamus must be likewise annexed to a copy thereof; and must, before the expiration of the first day of the term at which it is returnable, be either delivered in open court, or filed in the office of the clerk of the court, or in the supreme court, the clerk of the county wherein the term is to be held.²

As the writ corresponds to the complaint or declaration of the plaintiff, so the return also corresponds to the defendant's answer or plea;³ and hence it should deny the facts stated in the writ on which the claim of the relator is founded, or it should show that they are not sufficient in law to sustain his claim; or admitting the facts, it may show other facts sufficient in law to defeat the claim of the relator.⁴ But if the return set forth matters of evidence from which certain facts may be inferred, instead of positively and distinctly alleging the facts relied upon in answer to the mandamus, it will be bad on demurrer.⁴ The same general rules applicable to a plea or answer, are also applicable to the defendant's

¹ 10 Mod., 56; 1 Ducr, 451, 512; 9 N. Y., 263.

² Code Civ. Pro., § 2074.

³ 53 Super. Ct., 66.

⁴ 10 Wend., 25; 19 Id., 56, 63; 5 Term R., 74; 16 Barb., 52; 8 How., 358; 11 Id., 89; 32 Barb., 473; 51 How., 461; 35 Barb., 104; 70 N. Y., 228; 7 Hun, 228; 12 Abb. Pr., N. S., 47, 87; 18 How. Pr., 461; 37 N. Y., 344; 77 Id., 508.

return. Thus, it should be positive and certain;¹ must not be argumentative,² nor evasive.³

The provisions of chapter sixth of this act, relating to the form and contents of an answer, containing denials and allegations of new matter, except those provisions which relate to the verification of an answer, and to a counterclaim contained therein, apply to a return to an alternative writ of mandamus, showing cause against obeying the command of the writ. For the purpose of the application, each complete statement of facts, assigning a cause why the command of the writ ought not to be obeyed, is regarded as a separate defense, and must be separately stated, and numbered.⁴

Any matter of which the defendant proposes to avail himself, in making his defense, should be set forth with all the particularity essential to an answer or plea. Thus, when the objection to the validity of a law springs out of the failure of the legislature to comply with the provisions of the constitution, which is not apparent upon the act itself, it should be distinctly set forth in the return. A mere assertion in the return, that the law was oppressive and unconstitutional in its passage, is not enough.⁵ Such allegation is not a fact, but merely an argument or an averment of a principle of law.⁶

Several matters may be set up in the return, provided they are essential to a legal and valid defense, but such matters must be consistent with each other; for if otherwise, the whole will be quashed, as the court will not know which to believe.⁷ But if such independent matters are not inconsistent with each other, some being good and others bad, the return may be quashed as to

¹ 2 N. Y., 496; 1 Ld. Raym., 559.

² 5 Term. R., 66; 6 Mod., 309.

³ 1 Barb., 34.

⁴ Code Civ. Pro., § 2077.

⁵ 8 N. Y., 317.

⁶ 11 How., 89.

⁷ 2 Salk., 436.

the bad, and the relator may be put to plead as to the remaining.¹

The defendant is only called upon to answer the allegations of the writ in his return; and if he goes beyond, and his return contains anything more than a full answer to the substantial averments in the writ, such matter may be rejected as surplusage, or be stricken out on motion; such surplusage does not afford proper ground for a demurrer.²

The return, like an answer, may be amended by permission of the court, and probably upon similar terms; clerical mistakes can be amended after the return is filed.

A person who has made a return to an alternative mandamus, cannot be compelled to make a further return. The people, or the relator, may demur to the return, or to any complete statement of facts, therein separately assigned as a cause for disobeying the command of the writ, on the ground that the same is insufficient in law, upon the face thereof.³

The return being defective upon its face, may be quashed by the court, upon the motion of the relator,⁴ either in whole or in part.⁵ The motion to quash the return is also in the nature of a demurrer to the plea, under the old practice.⁶ So, also, where the return contains anything more than a full answer to the substantial averments of the writ, such additional matter becomes surplusage, and may be rejected.⁷

The same general rules apply to the answer as to the writ, for they are to each other as declaration and plea. Hence the reply must not be argumentative, double, etc.⁸

¹ 2 Term R., 456; 5 Id., 66; 6 Id., 493.

² 2 N. Y., 490; 11 How., 89.

³ 7 Term R., 699.

⁴ Code Civ. Pro., § 2078.

⁵ Cowp., 413; 2 Salk., 436.

⁶ 2 Term R., 456.

⁷ See 9 Wend., 429.

⁸ 2 N. Y., 496.

⁹ See 11 How., 89; 8 Id., 359; 16 How., 4; 6 Id., 179.

But it is held that the court will not permit subordinate tribunals to be harassed with *special* demurrers to returns made by them. If the relator is dissatisfied with a return made, conceiving it to be evasive, or the construction of any matter alleged in it to be of double character, upon suggestion of its insufficiency, a further or supplementary return will be ordered, and thus the rights of the party be effectually protected, as if permitted to demur *specially*.¹

Under the Code the party prosecuting the writ may demur, or plead to all or any of the material allegations or facts contained in the return, to which also the defendant is to reply, take issue or demur.²

Except as otherwise expressly prescribed in this act, the proceedings, after issue is joined, upon the facts or upon the law, are in all respects, the same as in an action; and each provision of this act, relating to the proceedings in action, apply thereto. For the purpose of the application, the writ, the return, and the demurrer are deemed to be pleadings in an action; and the final order is deemed to be a final judgment, and may be entered and docketed, and enforced, with respect to such parts thereof as are not enforced by a peremptory mandamus, as a final judgment in an action. But before the final order can be docketed, or an execution issued thereupon, an enrollment must be filed thereupon, as a judgment-roll in an action. For that purpose, the clerk must attach together and file in his office, a certified copy of the final order; the writ and the return, or copies thereof; together with the same papers, which are required by law to be incorporated into a judgment-roll in an action. Where the final order is in favor of the people or the relator, it must award a peremptory mandamus, to be forthwith issued.³

Oral pleadings upon a writ of mandamus are abol-

¹ 9 Wend., 429.

² Code Civ. Pro., § 2078.

³ Code Civ. Pro., § 2082; 23 N. Y. St. Rep., 88.

ished, and no pleadings allowed, except as prescribed in the foregoing sections of this article. The provisions of title second of chapter sixth of this act apply to the writ and the return; except that it is not necessary to serve a copy of either, upon the attorney for the adverse party, or to verify either, and that neither can be amended, without special application to the court, or stricken out as sham.¹

Plea and demurrer. The relator may demur or plead to any or all the material facts contained in the return.² He may demur to part of the return and plead to the rest; but cannot both demur and plead to the same allegations.³ The defendant may reply, take issue or demur to the defendant's plea.

Issues.

The issues raised in the proceedings are either issues of law or of fact, as in actions at law, and they are tried in the same manner. Issues of law are tried by the court, and are raised by demurrer to the writ, or to the return, or to some subsequent pleading awarded in such proceedings. These issues of law are raised on motions to quash or set aside the writ or return, etc. And so, likewise, an application for a peremptory mandamus without formally demurring to the return, is equivalent to a demurrer. In such case the facts set forth in the return are admitted to be true, and it becomes a question of law whether a peremptory mandamus should be awarded.⁴

An issue of law, joined upon an alternative writ of mandamus, granted at the general term, must be tried, and the final order thereupon must be made, at the general term.⁵

An issue of fact arises upon a denial, contained in

¹ Code Civ. Pro., § 2080.

² 16 Johns., 61.

³ 1 Wend., 39.

⁴ 7 Wend., 475; 6 Id., 559.

⁵ Code Civ. Pro., § 2085.

the return, of a material allegation of the writ, or upon a material allegation of new matter, contained in a return; unless a demurrer thereto is taken. Where the people or the relator demur to a complete statement of facts, separately assigned as cause for disobeying the command of the writ, an issue of fact arises, with respect to the remainder of the return.¹

But where a question of fact is raised by the writ and return thereto, or by the pleadings in the case, the cause must go to the circuit to be tried by a jury. And such issues of fact are to be tried in the county within which the material facts contained in the writ are alleged to have taken place.²

An issue of fact, joined upon an alternative writ of mandamus, must be tried by a jury, as if it was an issue joined in an action specified in section 968 of this act; unless a jury trial is waived, or a reference is directed by consent of parties. Where the writ was issued upon the relation of a private person, the relator or the defendant is entitled to a verdict, report or decision, where he would be entitled thereto, if the issue was joined in an action, brought by the relator against the defendant, to receive damages for making a false return.³

An issue of fact, joined upon an alternative writ of mandamus, granted at a special term of the Supreme Court, is triable in the county wherein it is alleged in the writ that the material facts took place, unless the court directs it to be tried elsewhere. An issue of fact, joined upon an alternative writ of mandamus, granted at a general term, is triable in the county, which determines the judicial department wherein the application for the writ must be made; unless the general term directs it to be tried in another county of the same judicial department. Where the writ was granted at the general term, the general term may detail a general term justice of the

¹ Code Civ. Pro., § 2086.

² 2 Burr. Pr., 179.

³ Code Civ. Pro., § 2088.

same or another judicial department, to preside at the trial. Upon the trial of an issue of fact, joined upon an alternative writ of mandamus, the verdict, report or decision must be returned to, and the final order thereupon must be made by, the general or the special term, as the case requires.¹

The preparation of the case, and the mode of trial, are the same as in personal actions. In general the relator holds the affirmative, and, therefore, the return is taken to be true until falsified upon the trial; although allegations in the return, which are denied by the relator in his reply, and not proved, are not to be taken as true on the trial.²

If, upon the issue, the finding is in favor of the relator, whether it be an issue of fact or of law, or if judgment be given by default, the relator recovers his damages and costs, the same as in an action on the case for a false return, which damages are assessed by a jury on the trial of issues of fact joined, or are assessed on a writ of inquiry, where the judgment is by default or on demurrer. The judgment is entered on the determination of the court, or the verdict of the jury, as in personal actions. But judgment for costs, or for damages and costs, in such cases, can be entered only by the special order of the court:³ and execution issues thereon as in personal actions.

The finding and judgment.

The order for a peremptory mandamus corresponds to a judgment upon the findings of the court or jury. If a verdict on the trial of an issue of fact be found for the relator, or if judgment be rendered for him upon demurrer or by default, the Code requires a peremptory mandamus to be granted to him without delay.⁴

¹ Code Civ. Pro., § 2084; 50 Hun, 479; 29 N. Y. St. Rep., 168.

² 12 How., 51.

³ 3 How., 379.

⁴ Code Civ. Pro., § 2082; 50 How. Pr., 353.

Where a return has been made to an alternative writ of mandamus, issued upon the relation of a private person, the court, upon making a final order for a peremptory mandamus, must also, if the relator so elects, award to the relator, against the defendant who made the return, the same damages, if any, which the relator might recover, in an action against that defendant, for a false return. The relator may require his damages to be assessed upon the trial of an issue of fact, if the verdict, report or decision is in his favor. Where he is entitled to a final order, for any other cause, he may require them to be assessed as in an action. Such an assessment of damages bars an action for a false return.¹

Costs.

Where an alternative writ of mandamus has been issued, costs may be awarded, as in an action, except that, upon making a final order, the costs are in the discretion of the court. Where a peremptory mandamus is granted, without a previous alternative mandamus, costs, not exceeding fifty dollars and disbursements, may be awarded to either party, as upon a motion.²

Enforcement of the writ.

Obedience to the peremptory writ is enforced as in an action, except in certain cases prescribed by section 2090 of the Code of Civil Procedure.

Where a final order awards a peremptory mandamus, directed to a public officer, board or other body, commanding him or them to perform a public duty, enjoined upon him or them by special provision of law, if it appears to the court that the officer, or one or more members of the board or body, have, without just excuse, refused or neglected to perform the duty so enjoined, the court, besides awarding to the relator his damages and costs, as prescribed in this article, may, in the same

¹ Code Civ. Pro., § 2088; 76 N. Y., 294.

² Code Civ. Pro., § 2080; 47 Hun, 43.

order, impose a fine, not exceeding two hundred and fifty dollars, upon the officer, or upon each member of the board, who has so refused or neglected. The fine, when collected, must be paid into the treasury of the state; and the payment thereof bars any action for a penalty, incurred by the person so fined, by reason of his refusal or neglect to perform the duty so enjoined.¹

Appeal.

An appeal from an order granting a peremptory writ of mandamus, where an alternative writ of mandamus was not previously issued, must be taken as from a final order made in a special proceeding. An appeal from a final order made upon an alternative mandamus, must be taken, as an appeal from a judgment; and each provision of law, relating to an appeal from a judgment, either to the general term or to the court of appeals, is applicable thereto. But where an appeal is taken, as prescribed in this section, from an order of the general term, granting a peremptory mandamus, made upon an original application, or from a final order, made upon an alternative mandamus, granted at the general term, the execution of the order appealed from shall not be stayed, except by the order of the same general term, made upon such terms, as to security or otherwise, as justice requires.²

Mandamus.

A writ of mandamus is a process issuing from a court of competent jurisdiction directed to some chartered, corporate or public body or officer, or other person commanding the doing of some public act or duty in the performance of which the party applying for the writ is interested, and by the non-performance of which he is injured or aggrieved.³ Through this process the courts

¹ Code Civ. Pro., § 2090; 47 How. Pr., 427; 24 N. Y., 267.

² Code Civ. Pro., § 2087.

³ 28 L. J. Q. B., 272.

exercise control over all public officers, corporations and persons or bodies invested with powers for *public purposes* to compel them to perform some *plain, legal duty*, when the party has no other convenient or effectual remedy.¹ It is a legal writ, and the forms of procedure and the rules which governed in the court of chancery have no application to it.² The granting is generally a matter of discretion,³ but the discretion is not arbitrary, it is governed by rules.⁴ It is issued on the relation of any person who has a clear, legal right to have that done which is set forth in the petition, and for the failure to do which there is no other *adequate*, specific remedy. The object and purpose of the writ is to prevent "a defect of justice." In *Rex v. Bristol Dock Co.*,⁵ the court held that, where there was a specific remedy, even though only by indictment, a mandamus could not issue, unless the relator established a clear legal right thereto, and also show that the remedy provided was ineffectual to secure the result to which he was entitled. In that case, it was sought to compel the defendants to pay to the relators the damages that they sustained, by reason of the pollution by them of the waters of the river Avon under the provision of the statute. The court held that the compensation provided by the statute did not extend to or embrace damages such as the relators sought to enforce, and that they show no more interest in the subject-matter thereof than all the public sustained, and for this reason were not entitled to the relief; also that, if the works wrought the damage set forth in the declaration, the relator's remedy was complete and ample under an indictment for a nuisance and a consequent abatement of the nuisance. So in *Rex v.*

¹ 10 Ad. & El., 581; L. R., 5 Q. B., 269.

² 3 Civ. Pro. R., 180.

³ 66 N. Y., 360, 606; 76 N. Y., 326.

⁴ 78 N. Y., 56; 58 N. Y., 322.

⁵ 1 Cowp., 376.

⁶ 12 East, 429.

Chester,¹ the relator sought by mandamus to compel the Bishop of Chester to license him as a curate of an augmented curate. There was a cross nomination, and the writ was refused, because the relator had another specific, legal remedy by *quare impedit*, which would give all the relief to which the party was entitled. Thus it will be seen, without reference to the multitude of cases upon this point, that, whenever there is an *adequate* specific *legal* remedy, whether by indictment or action, a mandamus cannot issue. Two circumstances must concur to authorize the issue of the writ: 1st, a clear legal right thereto, and 2d, the absence of any other equally adequate remedy for enforcing it,² also, that the person or body to whom the writ is directed, still has it in his power to perform the duty required. Whatever is required to be done by the relator as a condition precedent to the right demanded must be shown affirmatively to have been performed.³

The fact that there is a remedy by indictment or action does not necessarily deprive the party of this remedy. It must not only appear that there is another remedy, *but also, that such other remedy is equally effectual to secure the results to which the party is entitled*, and if it is doubtful whether there is a remedy, the court will issue the writ.⁴ The mere fact that there is another remedy does not preclude the issue of a mandamus, the question always is, whether there is another adequate and efficient remedy. It is appropriate where a public duty is imposed or some act specifically directed by statute. But it will not lie to enforce mere private contracts, however specific or peculiar their nature.⁵ Where a specific duty is imposed on public officers by statute, and the omission to perform effects a particular party only,

¹ 1 T. R., 396.

² 6 Ad. & El., 372; 14 Abb. 9.

³ 66 N. Y., 606; 71 N. Y., 171; 72 N. Y., 496.

⁴ Id.; 2 B. & A., 246; 3 Jur., 103; 1 B. & S., 5; 24 Hun, 263; 70 N. Y., 228; 54 N. Y., 520; 11 Hun, 56; see 72 N. Y., 612.

⁵ 21 Hun, 184.

and not the whole list, a mandamus will issue.¹ Mandamus will lie to reinstate an honorably discharged Union soldier in a position from which he has been removed in violation of the Laws of 1887, chap. 464.² If damages will afford proper relief, and an action can be had therefor, then the party will be left to pursue that remedy, but if, in order to do justice between the parties and afford proper relief, specific performance is essential, a mandamus will issue, although the relator may have another remedy. It is the *adequacy* of the remedy that affords the test of right.³ Thus in *Indianapolis, etc., R. R. Co. v. State*,⁴ the defendant railroad company having its track along and across the streets of the city, neglected to level and grade the embankments so as to render the use of the streets safe, easy and convenient by the public, and, upon an application for a mandamus to compel it to change their road-bed in its grade, etc., and to restore the streets to a more convenient and safe condition, it was held that, although persons damaged thereby might have a remedy against the city, and the city had also a remedy over against the railroad company, that this was not such adequate and specific relief as precluded the issue of a mandamus. So, too, it must appear that the writ would be beneficial and operative; or at least, it must not appear that it would necessarily be inoperative and followed by no beneficial results. In such an event, even though it is plainly the duty of the defendant to do the act, yet if the court is satisfied that no benefit could possibly result from the writ, it will be denied.⁵ So, too, it must appear that there has been a direct refusal on the part of the defendant to do the act which it is sought to enforce, or at least, circumstances which satisfy the court that the defendant does not

¹ 12 How., 224; 20 How., 78; 1 Abb. N. S., 200.

² 28 N. Y. St. Rep., 566.

³ 24 Mich., 468.

⁴ 38 N. J. L., 396; 37 Ind., 489.

⁵ 10 Jur., 159.

intend to do the act required.¹ "There need not be a refusal in so many words," said LITLEDALE, J., in the last case referred to. "It is not, indeed, necessary," said Lord DENMAN, C. J., in the same case, "that the word *refuse*, or any equivalent to it, should be used, *but there should be enough to show that the party withholds compliance, and distinctly determines not to do the act required.*"

The question is, whether the party has done what the court sees to be equivalent to a refusal."² In the case previously referred to (*Rex v. Canal Co.*), the defendants were sought to be compelled by mandamus to go on and construct and complete the railway bridges and other works which by statute they were required to construct as a part of their right to build their canal. The relator served a notice upon them to go on and construct and complete certain works described in his notice. At the next meeting of the company they passed a resolution signifying their intention to go on. But the resolution not being carried into effect, the relators again by letter requested them to go on. The company replied by representing that certain parties had brought an action against them respecting their crossing their railroad, and they suggested the propriety of waiting the result of that action. The works were not proceeded with, and a mandamus to compel them to do so was applied for. The court held that there was no such refusal to do the acts, as entitled the relators to a mandamus.³ There should be a demand of the specific thing sought to be enforced, and a refusal or equivalent circumstances thereto. A refusal may be implied from a neglect to do, or take open measures for doing the act within a reasonable time after demand.⁴ The writ presupposes two things to exist on the part of the defendant, *the duty and the power to do the thing*

¹ 3 Ad. & El., 217.

² 2 Ad. & El., 588.

³ 4 Q. B., 162.

⁴ 17 Q. B., 361.

sought to be enforced, and both must be shown or the writ cannot issue, for the very foundation of the writ is *the right of the relator to have the thing done, and the duty of the defendant to do it*; also, *that the thing required to be done is possible, and within the power of the defendant to do*, and if it turns out that the duty does not exist, that the act is impossible, or that the defendant has not the power to do it, the writ is bad.¹ Where the act is *impossible*, even though the duty to do it is imposed by statute, a mandamus will not issue.² Thus, when a mandamus was brought to compel a railway company to go on and complete their works as required by statute, it was held that a return setting forth that the company had raised and expended all the funds which they were empowered to raise, and had no funds or power to raise them to complete the works, was a complete excuse, and a mandamus could not issue, because there was no possible method by which the defendants could obey the writ.³ "A writ of mandamus," said Lord CAMPBELL, C. J., "presupposes the required act to be possible, and to be obligatory when the writ issues. Generally, the writ suggests facts showing the obligation and possibility of fulfilling it."⁴ But if the power and duty exists when the writ is applied for, the fact that the power may expire before a return can be made will not operate to defeat the writ, nor is it an objection to its issue.⁵ "The question is," said COLERIDGE, J., simply whether the company have time for an act which we assume they are bound to do. If we grant a mandamus they may prove on a return that they are not bound, and then the writ will not prejudice them. If it appears that that they are bound, they will take no benefit by delay, because the time for compliance will at any rate run

¹ 6 Railw. Cas., 634.

² 16 Q. B., 28.

³ 16 Q. B., 864.

⁴ 1 E. & B., 253; Id., 774; Id., 372.

⁵ 16 Q. B., 904.

from the present time (the issue of the writ). As to sufficiency of time, the construction will be rigorous against them, *because they might have proceeded at first*, and are bound to make out very strictly that they have been unable." A mandamus cannot be granted to undo that which has been done, even though the method in which the act was done was unauthorized and unlawful, as to compel a corporation to remove the seal from the register of shareholders, when it was affixed there without authority.¹ Lord CAMPBELL, C. J., in this case said, "we must not grant this rule. * * * The writ of mandamus is most beneficial, but we must keep its operation within legal bounds, and not grant it at the fancy of all mankind. *We grant it when that has not been done which the statute orders to be done; but not for undoing that which has been done.* We may, upon application for a mandamus, entertain the question, whether a corporation, not having affixed its seal, be bound to do so, but not the question whether, when they *have* affixed, they were right in doing so." In *The Queen v. Sanford*,² the court refused to direct the registrar to erase an entry of a birth which he had been induced to make by false representation. In *Reg. v. The Justices, etc.*,³ the court ordered the quarter sessions to erase an entry confirming an order, on the ground that the sessions had no authority to confirm the order, but the authority of this case is directly impugned and overruled in *Ex parte Nash, ante*. *Laches* or delay in applying for a writ may be satisfactorily explained, and if it appears that the relators were justified in believing that the defendants intended to do the acts, they cannot be defeated of their rights by this justifiable confidence in the defendants' intention to discharge their duty.⁴ "The lapse of time is material," said Lord DENMAN,⁵ "when the court is called upon

¹ 15 Q. B., 92.

² 1 Q. B., 886.

³ 5 Q. B., 1.

⁴ 16 Q. B., 886.

⁵ 12 Q. B., 157.

to exercise a discretion," and in that case the relator having delayed applying for the writ for twelve years, seven of which had elapsed after the compulsory powers had expired, there being no reasonable explanation of the delay, it was held the writ should not issue. COLERIDGE, J., in the same case, commenting upon the effect of *laches* on the relator's part, said, "we have been asked what number of years will bar an application of this kind. It is not necessary to fix any number. *Any apparent laches unexplained is the bar.* It might take effect in a year." In all cases the question as to whether the relator is chargeable with *laches* must depend upon the circumstances of each case.¹

In modern practice it is nothing more than an ordinary action at law in cases where it is the appropriate remedy, and does not issue in virtue of any prerogative power.² Its issue is a matter resting, in a measure, in the discretion of the court;³ but if a party shows himself legally entitled thereto, it is error to deny it. But, in order to entitle a party to its issue, it must appear that he has a legal right to it;⁴ and the fact that the parties *consent* thereto is not a good cause for its issue; and unless there is a clear legal right to have it issue, it cannot form the basis of a valid judgment. Nor should it ever be granted where there is reason to suspect that there is collusion between the parties.⁵ And it only lies from a superior to an inferior tribunal to compel action; never to direct how it shall act, or to interfere with the exercise of a discretionary power;⁶ and when

¹ 2 Q. B., 47; 10 Ad. & El., 53.

² 24 How. (U. S.), 66; 4 Ark., 302; 7 Week. Dig., 411.

³ 78 N. Y., 56; 76 Id., 326.

⁴ 13 Abb. N. C., 159; 58 How., 55; 21 Hun, 184; 16 Hun, 313; 107 N. Y., 235; 11 N. Y. St. Rep., 408.

⁵ 22 La. Ann., 379; 2 P. & H. (Va.), 38; 12 Barb., 217; 11 Ind., 205.

⁶ 44 Ala., 333; 7 Cr. (U. S.), 577; 5 Peters (U. S.), 190; 7 Ala., 459; 10 Ark., 243; 5 Ga., 522; 27 N. Y., 378; 49 Barb., 31; 78 N. Y., 33; 30 How., 38; 1 Abb. N. S., 200; 104 N. Y., 96; 5 N. Y. St. Rep., 553; 49 Hun, 425.

the party has no other specific or adequate legal remedy.¹ But in the case of corporations and ministerial officers, they may be compelled to exercise their functions even though there is another remedy, where the duty is plain and its performance possible.² The writ will not generally be issued if proceedings have been *commenced* in equity, although the fact that a party *may* have relief in a Court of Equity is no reason why the writ should be denied.³ Nor will it issue where the officer or tribunal against whom it is claimed has not the means to do the act required, or to compel the doing of an act, the doing or not doing of which rests in the *discretion* of the officer or tribunal against whom it is sought;⁴ nor when the doing of the act is legally impossible, or when the power to perform it is not complete, but depends upon the action or approval of some other authority;⁵ or will involve the officer in litigation, the result of which is doubtful.⁶

Courts will not interfere with the exercise of a discretionary power,⁷ unless it appears that such discretion has been abused.⁸ But where an officer or tribunal *refuses* to exercise its discretion, a writ of mandamus will issue to compel them to *act*, but will not direct the manner of their action or interfere with their discretion,⁹ where an officer is invested with a discretion as to the doing of an act, it cannot be com-

¹ 44 Ala., 284, 11 Penn. St., 196; 25 Barb., 73; 26 Ark., 482.

² 53 Mo., 338; 8 Kan., 458; 6 Lans., 253.

³ 53 Ill., 432; 32 Md., 32.

⁴ 32 La. Ann., 318; 44 Ala., 64; 26 Ark., 237; 23 La. Ann., 76; 44 Miss., 493; 13 Abb. Pr., N. S., 159; 37 Conn., 103.

⁵ 3 Oregon, 33; 33 N. J., 173; 27 Ark., 457.

⁶ 34 N. J., 255.

⁷ 17 N. J., 355; 1 Abb. Pr., N. S., 230; 26 N. J. L., 311; 6 Cow., 59; 40 Ill., 93; 18 B. Monr. (Ky.), 9; 3 Texas, 51; 11 Pick. (Mass.), 189; 2 Chand. (Wis.), 247; 74 N. Y., 443; 24 N. Y., 114; 54 Barb., 481.

⁸ 2 McCord (S. C.), 170.

⁹ 27 Ark., 106; 26 id., 613; 32 La. Ann., 76; 101 Mass., 488; 3 Brewst. (Penn.), 596; 44 Ala., 654; Id., 333; 3 Keyes, 83; 23 Wend., 460; 6 Lans., 251.

pelled by mandamus;¹ and if judgment be given for the relator under such circumstances, it will be arrested on motion for the insufficiency of the writ.² Where the statute gives a corporation or public body the option of doing an act in either of two ways, the writ should require him to elect how to do the act and then to do it, and if it does not give him the benefit of the option, or state facts that show that the option no longer exists, it will be bad.³ In *The South Eastern R. R. Co. v. The Queen*,⁴ it was held that where the statute gave a railway company the right of crossing a highway either by carrying the road over the highway by means of a bridge or the railway over the highway, unless the record show that the option was at an end, a mandamus directing how the work should be done, as, that the highway shall be carried over the railway by means of a bridge is bad.⁵ In *The Queen v. The London, etc., Railway Co.*,⁶ it appeared that by statute when the promoters of an undertaking demand a compulsory sale of premises, the owner may refuse to sell less than the whole; but if they have given notice of requiring a bond, the owner cannot by reason of such notice require that the whole be taken, and the promoters, on his refusal to sell part, may abandon the purchase, and the purchase cannot be compelled by mandamus either for the whole or a part. To compel a municipal corporation to levy a tax to pay a judgment against it;⁷ to compel assessors to correct an erroneous assessment;⁸ to compel a board of supervisors to audit a claim;⁹ to compel a board of supervisors to raise tax under a statute;¹⁰ to compel a board of county can-

¹ 12 Q. B., 654.

² Id.

³ 4 H. L. Cas., 471.

⁴ 17 G. B., 485.

⁵ 14 Q. B., 472; Id., 459; 3 Ad. & El., 535.

⁶ 12 Q. B., 175.

⁷ 6 Wall. (U. S.), 514; Id., 481.

⁸ 45 Barb., 644.

⁹ 53 Hun, 259.

¹⁰ 49 Hun, 32.

vassers not to canvass an irregular return, but to substitute therefor the regular return filed in the county clerk's office;¹ to compel a railroad company to build and keep in repair bridges where the road crosses a highway;² or to pursue the mode prescribed in their charter as to crossing rivers or other water courses, or the performance of any acts in the construction of their road affecting either public or individual rights;³ to restore a public officer to his office when the facts to justify his removal therefrom are not clearly established;⁴ and to restore a member of any society to his membership from which he has been wrongfully expelled.⁵ Under Laws 1887, chapter 418, the common council of New York city has power to grant a license to keep a stand on the street within the stoop lines, providing the consent of the adjoining owner is obtained, and a peremptory mandamus to compel the authorities to remove the stand on the ground that it is not used for the purposes within the license will not be granted.⁶ Mandamus to commissioner of public works, directing him to remove street obstructions, is not the proper remedy where the alleged obstructions are erected by a corporation under color of legislative authority, in a comparatively uninhabited part of the city and cause no present substantial loss.⁷

To compel the sheriff to keep his office at the place designated by law;⁸ to compel any officer, who by law is required at the close of his duties to return his books to a certain officer, to discharge that duty;⁹ to compel the incumbent of an office to deliver up the papers, property or insignia of his office to his successor, when the

¹ 46 Hun, 390.

² 37 How. Pr., 427.

³ 9 Rich. (S. C.), 227.

⁴ 3 H. & M. (Va.), 1; 35 Barb., 531; 9 Wis., 254.

⁵ 12 Cush. (Mass.), 402; 22 Mich., 86.

⁶ 1 N. Y. Supp., 95.

⁷ 20 Abb. N. C., 393.

⁸ 4 Wis., 27.

⁹ 27 Ark., 106.

right of such successor is clear;¹ to compel any public officer to discharge a ministerial duty imposed upon him by law;² as a register of deeds, to record a deed required to be recorded in his office;³ to compel a town committee to pay the land-damages to land-owners whose land is taken for a highway.⁴ Thus a writ of mandamus will issue to compel commissioners appointed to assess a tax for a specific purpose, to discharge their duty;⁵ to compel a city council to appropriate money to pay certain expenses which it is empowered to by the legislature;⁶ to compel the mayor and aldermen or other board clothed with the power, to carry out specific purposes and perform specific duties imposed upon them by law;⁷ to compel trustees to admit children entitled to do so to attend the public schools;⁸ to compel a board of canvassers to meet and make a complete canvass of all returns received by them;⁹ to compel a corporation and its officers to exhibit the stock book to a stockholder;¹⁰ to compel a police board to place the relator upon the retired list with a pension;¹¹ to compel the attorney general to issue a certificate;¹² to compel the comptroller to perform a duty imposed statute;¹³ to compel secretary of state to enforce articles of incorporation;¹⁴ to compel auditor to issue draft to pay canal appraiser's award;¹⁵ to compel canal appraisers to award;¹⁶ to compel county clerk to record deed properly

¹ 24 Vt., 658; 7 Cush. (Mass.), 226; 21 Pick. (Mass.), 148.

² 15 La. Ann., 603; 3 B. Monr. (Ky.), 648; 1 Morr. (Iowa), 81.

³ Kirby (Conn.), 345.

⁴ 29 N. J., 388.

⁵ 51 Ill., 57.

⁶ 3 Brewst. (Penn.), 596.

⁷ 101 Mass. 488.

⁸ 7 Nev., 342.

⁹ 18 Fla., 55.

¹⁰ 68 N. Y., 30; 20 Abb. N. C., 172.

¹¹ 108 N. Y., 105; 13 N. Y. St. Rep., 89.

¹² 17 How., 142; 29 Barb., 96.

¹³ 42 N. Y., 404.

¹⁴ 19 Hun, 259.

¹⁵ 63 N. Y., 348.

¹⁶ 6 Cow., 518.

acknowledged;¹ to compel register to file a satisfaction piece;² to compel a sheriff to give a deed;³ to compel a judge of an inferior court to sign a bill of exceptions in a case tried there;⁴ or to make up a record and give a judgment thereon, so that a writ of error may be brought;⁵ compel a judge to sign a judgment rendered by his predecessor;⁶ to compel county treasurer to pay bills audited by the supervisors,⁷ but it will be refused where a portion of the audited account appears to be fraudulent and another portion not legal;⁸ to compel a judge to enter judgment on the report of a referee;⁹ to compel the clerk of a court to issue execution on a judgment;¹⁰ to compel commissioners of highways to lay out a road required by statute;¹¹ also, when they had decided to lay out a highway, to compel them to complete the record of their decision;¹² to direct removal of highway and consequent taking of lands therefor;¹³ and generally to compel all officers, corporations or inferior tribunals to perform all ministerial duties imposed upon them by law.¹⁴ But in order to entitle a person to the writ, two things must concur: 1st. A clear legal right to have the act done to compel the doing of which the writ is sought; and, 2d, that there is no other adequate legal remedy by which the specific performance of the duty can be enforced, and that the discharge of

¹ 14 Johns., 324.

² 37 Barb., 466; 23 How., 223; 46 How., 151.

³ 2 N. Y., 484.

⁴ 4 Coll. (Va.), 485; 1 Caines, 511; 3 Cold. (Tenn.), 255; 3 Ill., 189; 5 Peters (U. S.), 190.

⁵ 7 Peters, 634.

⁶ 8 Id., 291.

⁷ 54 How., 1; 15 Barb., 529.

⁸ 71 N. Y., 171.

⁹ 2 Cal., 245.

¹⁰ 28 Cal., 68.

¹¹ 19 Wend., 54; 27 Barb., 94.

¹² 2 Hun, 149.

¹³ 58 N. Y., 152.

¹⁴ 1 Cold. (Tenn.), 207; 10 Pick. (Mass.), 244; 20 Id., 484; 1 Mich., 359; 84 Iowa, 175; Id., 510; 2 Neb., 7.

the duty is not discretionary.¹ It cannot be granted to compel county canvassers to send back returns to inspectors where it appears there is no clerical error but a fraudulent alteration;² nor to county canvassers to correct error;³ nor to compel an overseer of poor to prosecute to judgment actions for penalty under the excise law;⁴ nor to interfere with the discretion of excise commissioners in granting or refusing a license.⁵ Permissive words used in a statute authorizing a thing to be done are often held to be directory and compulsory, particularly when the power or authority is given in order that it may be exercised for the public benefit, and the interests of the public manifestly require the authority to be acted upon, and in such cases the performance of the duty will be enforced by mandamus.⁶ But permissive words will receive their natural meaning, and will not be made obligatory, unless it plainly appears from the general context of the instrument in which they are found that they were intended to be obligatory, or unless it be shown that the public interests manifestly require such a construction to be put upon them. Railway acts, incorporating railway companies, and authorizing the construction of a railway, are, in general, merely permissive. They confer extensive powers for the compulsory purchase of land, and the construction of works for the benefit of the public, but it is, in general, discretionary with the companies whether they will exercise the whole or a portion of these powers, or refrain altogether from using them.⁷ And when the words of a statute or charter are im-

¹ 33 N. J., 396; 13 Abb. Pr. N. S., 159; 12 Barb., 217; 1 Ohio St., 77.

² 58 How., 141; 11 Abb. N. S., 203.

³ 12 Barb., 217; but see L. 1880, chap. 460, and 2 Civ. Pro. R., 452; 64 How., 201.

⁴ 74 N. Y., 443.

⁵ 54 How., 327.

⁶ 5 Wall. (U. S.), 715; 19 Mich., 392; 6 Cold. (Tenn.), 398; 13 Fla., 55; 101 Mass., 488; 1 Gray (Mass.), 72; 10 Pick. (Mass.), 244; 44 Penn. St., 336; 39 Barb., 651.

⁷ 1 Ell. & Bl., 861; 22 L. J. Q. B., 225; 1 Ell. & Bl., 874; Id., 203; 2 W. Bl., 708.

perative, and command the thing to be done, it is, nevertheless, a good excuse to show that circumstances have arisen rendering the exercise of the statutory power and command impracticable.¹ Thus, in an English case, where the charter of incorporation of an ancient town, conferring various municipal privileges on the town, provided "that the mayor and jurats may, for the future, hereafter have and hold, and have power to hold, a court of record, to hear and determine all pleas, actions, complaints, etc.," it was held that the words were compulsory, and that they were bound to hold the court for the benefit of the inhabitants.² A writ of mandamus lies to compel the holding of a court and the discharge of certain functions;³ where a court refuses to carry out the mandate of a superior tribunal;⁴ to compel a Circuit Court to sign a bill of exceptions;⁵ to hear an application for an attachment for violating an injunction;⁶ to reinstate a cause improperly abated by order of court;⁷ to compel an inferior court to make up a record and render judgment thereon, so that a writ of error may be brought;⁸ to compel a judge to sign a bill of exceptions;⁹ to compel a court to issue process to carry a decree into effect where an appeal has been taken but no supersedeas obtained;¹⁰ to compel entry of judgment on the report of a referee;¹¹ to compel the restoration of a cause improperly stricken from the docket;¹² to set aside an order dismissing a cross bill,

¹ 16 Q. B., 884; 1 Ell. & Bl., 981; 22 L. J. Q. B., 191.

² Com. Dig., Parliament, R., 22; 1 D. & R., 148; 5 B. & Ald., 692, *n*; Id., 691; 4 Dowl., P. C., 562.

³ L. R., 5 Q. B., 251; 7 Cr. (U. S.), 577.

⁴ 1 Blackf. (Ind.), 155.

⁵ 5 Peters (U. S.), 190.

⁶ 7 Cal., 130.

⁷ 7 Ala., 459.

⁸ 7 Peters (U. S.), 634.

⁹ 1 Hun, 252.

¹⁰ 22 Gratt. (Va.), 458; 17 How. (U. S.), 275; Id., 283.

¹¹ 2 Cal., 245.

¹² 20 Ala., 380.

and its restoration to the docket to abide the final determination of the cause;¹ to compel a judge to receive a verdict which he has improperly refused to receive;² to compel a county judge to file a decision, as filing after it is made is a ministerial act;³ to compel county judge to place on calendar an appeal it had prematurely dismissed;⁴ to compel entry of judgment on verdict, where inferior court had no power to grant a new trial;⁵ to compel issuing of warrant in summary proceedings;⁶ to compel settlement of case by court or referee;⁷ to compel sealing bill of exceptions;⁸ to compel justice of Marine Court to enforce performance of an act not judicial;⁹ and generally an inferior tribunal can be compelled by mandamus to do its duty, but the courts will never interfere, nor, indeed, have they the power to interfere, by mandamus, with the exercise of strictly discretionary powers of an inferior court or tribunal of any kind.¹⁰ The rule is, that a mandamus will issue to an inferior court to compel the performance of an official duty to which a party is clearly entitled, and which is refused to him, when no other effectual remedy exists, and to compel a judicial officer to perform an act which it is his imperative duty to perform, and with reference to the *manner* of the performance of which he has no reasonable discretion; and even where the right to exercise a discretion exists, and the court improperly refuses to exercise it, its exercise may be compelled, but the particular *mode* of

¹ 46 Ala., 384.

² 46 Mo., 83.

³ 5 How., 47.

⁴ 13 How., 277.

⁵ 2 Johns., 370; 1 Johns. Cas., 180; 2 Caines' Cas., 319.

⁶ 5 Abb., 205.

⁷ 14 Abb., 19; 35 Barb., 105; 6 Johns., 279; 5 Wend., 132; 2 Johns. Cas., 117.

⁸ 59 N. Y., 80.

⁹ 7 Hun, 303.

¹⁰ 4 W. Va., 300; 44 Ala., 654; Id., 333; 14 Wall. (U. S.), 152; 24 Mich., 408; 47 Miss., 547; 9 R. I., 138; 5 Cow., 31; 7 Daly, 434; 14 Abb., 19; 18 Wend., 79; 47 How., 162; 1 Hun, 252; 1 Denio, 679; 5 How., 47.

its exercise must be left free from coercion or restraint.¹ It lies to compel a court to fulfill their duties and to hear and adjudicate upon a matter pending before it, when there is no reasonable excuse for not doing so.² But when the court or body has entered upon the matter, and have decided it, the court will not compel them to reconsider the matter, or rehear it, upon the ground that they have come to a wrong conclusion. In such cases the party must pursue his remedy by appeal or otherwise, as the writ of mandamus cannot be used to interfere with the discretion of a court, or to compel them to act otherwise than according to their own judgment in a matter left to their discretion.³ Whenever the law requires a thing to be done, and the public at large are interested in the doing of it, a mandamus will go to order it to be done by the person upon whom the obligation of doing it is imposed. If he is to act according to his discretion, and he will not act or even consider the matter, the court may compel him to put himself in motion to do the thing, though it cannot control his discretion.⁴ Thus, after final judgment in an action, the court will not, by mandamus, while the judgment remains unreversed, compel the court to avoid the *effect* of the judgment.⁵ It cannot be granted, requiring the board of police commissioners to place the widow of a deceased officer upon the pension roll fund. The law gives the board power to grant pension in such cases in its discretion, but there is nothing which requires them, in any case, to exercise that power in favor of any applicant.⁶ The court never grants a mandamus, except it indisputably appears that the party to whom it is directed has, by law, power to do

¹ 37 Conn., 103; 26 Ark., 613; 1 Mich., 359.

² El. Bl. & El., 253.

³ 13 Q. B., 325; 25 Wend., 692; 39 Barb., 651.

⁴ 13 Pet. (U. S.), 404; 15 Id., 9; 2 Denio, 191; 10 N. J. L., 57; 3 Binn. (Penn.), 278; 24 Ala., 98; 30 How., 78.

⁵ 6 Ala., 511.

⁶ 32 N. Y. St. Rep., 440.

what he is enjoined to do, and will not compel any person to exercise a doubtful jurisdiction;¹ nor where the amount is insignificant and would not benefit the petitioner;² nor to compel the payment of a sum claimed to be due under a contract that has not been done according to the contract;³ nor to compel a person to amend the records after his term of office has expired;⁴ nor when the act commanded is impracticable or legally impossible.⁵ Thus, a mandamus will not issue to compel the doing of an act which is prohibited by injunction;⁶ but the United States Courts will not recognize an injunction issued by a State Court, enjoining the doing of an act that is sought to be enforced by a mandamus before it. *Johnson v. Riggs*, ante; or where it would be unavailable for want of power in the defendant to perform the act required by it; or fruitless or ineffectual;⁷ or to perform an act which is not required by law as incident to the defendant's duties;⁸ or to enforce a mere contract obligation where there is no trust;⁹ or to compel the doing of an unlawful act;¹⁰ or where there is a good reason on the part of the defendant for not doing the act, as for refusing to record a discharge of a mortgage, where the certificate is insufficient;¹¹ or to record a deed not properly acknowledged or attested, or for any cause not entitled to go upon the records; or for refusing to admit a person to a society — in this case a medical society — where he

¹ 6 Pet. (U. S.), 661; 15 La. Ann., 89; 1 H. & J. (Md.), 359; 2 Va. Cas., 208.

² 27 Vt., 297.

³ 1 Jones (N. C.), 484.

⁴ 20 Vt., 487; 12 Wend., 183.

⁵ 33 N. J., 173; 34 Id., 254; 22 La. Ann., 611; 27 Ark., 457; 3 Oregon, 55; 54 Ill., 39; 36 Penn. St., 362; 15 Barb., 607; 29 Penn. St., 129; 29 Barb., 96; 20 Cal., 591; 27 Barb., 94; 10 Wend., 393.

⁶ 7 Ohio St., 278; 4 Hill, 481.

⁷ 29 Penn. St., 121.

⁸ 7 Iowa, 425; 22 Tex., 559.

⁹ 16 Ohio St., 278.

¹⁰ 4 Humph. (Tenn.), 437; 11 Id., 306; 11 Miss., 695.

¹¹ 32 Barb., 612.

would be immediately liable to expulsion;¹ nor generally, when the right of the relator depends upon holding an act of the legislature unconstitutional;² nor to try the *title* to an office;³ nor to compel the payment of unliquidated damages;⁴ nor to prevent an anticipated error or defect of duty;⁵ and generally, it may be said that a mandamus will not be issued unless the duty it is sought to enforce is a *legal* duty, clear and free from doubt, and the right of the party seeking redress through this summary remedy is equally clear, nor unless the remedy will be effectual, and the result sought to be obtained is of more than mere trifling consequence or importance.* The application for the writ and the answer are the only pleadings, and if the defendant demurs to the application, if the demurrer is overruled the writ will issue, and no other pleadings will be considered.' A mandamus will only issue to compel a judicial officer to act, it will not, in matter resting in any measure in his discretion, direct him how he shall act. Thus, it will not lie to compel a magistrate to accept the report of a referee which he has rejected;⁶ nor to correct the entry of a judgment upon his docket;⁷ but it will lie to compel him to amend his record according to the facts, when such amendment applies merely to a ministerial error, but in such cases it will not be granted when the amount involved is trifling, and the correction would be of no practical benefit to the relator;⁸ nor, generally, to do any act when they are invested with discretionary powers and have exercised them.¹¹ The question is not whether the

¹ 1 Hill, 665.

² 20 Cal., 591; 2 Abb. Pr., N. S., 548.

³ 5 Hill, 615; 18 Mich., 338; 7 Ga., 478.

⁴ 19 Ga., 97.

⁵ 20 Md., 449.

⁶ 27 Vt., 297.

⁷ 3 Neb., 244.

⁸ 2 N. H., 128.

⁹ 17 Mo., 601.

¹⁰ 27 Vt., 297.

¹¹ 3 N. J., 576.

officer invested with discretionary powers has acted wisely or unwisely, but whether he has acted at all, and within the scope of the powers conferred upon him; if so, he cannot be compelled by mandamus to act *de novo*, or to change the result.¹

Thus, where a board to canvass votes are unable to determine whether a word is *fifty* or *forty*, they are to exercise their discretion in determining in view of such evidence as they have before them, and a mandamus will not lie to compel them to change their finding or to hear new evidence.² So where a contracting board has issued bids for public work, and are only restricted by a requirement that when the contract is made it shall be with the lowest bidder, they, nevertheless, have the right to reject a bid as being deceptive, fraudulent or disadvantageous, and a mandamus will not lie to compel them to give the contract to the lowest bidder.³ So, generally, when there is any valid reason for not doing the act sought to be enforced, a mandamus will not issue.⁴ Where, however, a contracting board is required by law to give a contract to the lowest bidder, and the person making the lowest bid has in all respects complied with the law, the board may be compelled, by mandamus, to give the contract to him, and they cannot defend upon the ground that the state is the *real* defendant.⁵ The duty of the board of canvassers of a county election is to receive and count the returns of votes, and not to judge of their validity, or of any fraud affecting them, that question being for another specially appointed tribunal, upon a case properly brought after the board have declared the result. Held, that the action of the board was in this matter ministerial

¹ 24 Iowa, 266; 4 Wall. (U. S.), 522.

² 7 Iowa, 390.

³ 33 N. Y., 332; 12 Abb., 133; 11 id., 289.

⁴ 27 Barb., 562; 29 Tex., 508; 20 Vt., 487; 13 Abb., 374, n; 37 Barb., 440; 15 Abb., 115; 23 Barb., 333; 2 Abb. N. S., 315.

⁵ 46 Barb., 254.

only, and that mandamus would lie.¹ They are to decide whether the papers are returns, and signed as such, but they are not to judge as to their sufficiency, or as to the qualifications of the officer signing them.² As in this case, where it was held that they were not authorized to reject the return because the officers signing did not appear to be sworn.³ A mandamus may issue compelling the board to include such returns, notwithstanding that supposed defect, leaving it for the election tribunal, upon the report of the board, to decide whether the defect is fatal. Though the command to include these might be considered to be a command to do a particular act—make the canvass—in a particular way, yet that is no objection to the mandamus, since here the manner of doing is of the essence of the deed, and is regulated by statute, and not left to the discretion of the party performing. Upon the question whether a word is “fifty” or “forty,” the canvassers of an election are to exercise their discretion upon the evidence before them, and where there has been no clear abuse of discretion, the court cannot, by mandamus, upon the hearing of new testimony, order the board to come to a different decision.⁴ Mandamus lies to compel inspectors of election to register a voter.⁵ The writ does not lie to compel the county officer to do that which no law makes it his duty to do.⁶ Mandamus will not lie to compel the supervisors to issue a certificate to one whom they have declared not elected.⁷ In general, where a man is refused to be admitted, or wrongfully turned out of any office or franchise that concerns the public or the administration of justice, he may be admitted or restored by a writ

¹ 7 Clarke (Iowa), 186; Id., 390.

² Id.

³ Id.

⁴ 7 Clarke (Iowa), 390.

⁵ 64 How., 68; 12 Abb. N. C., 103.

⁶ 7 Clarke (Iowa), 425.

⁷ 10 Cal., 376.

of mandamus.¹ So to test the right of one elected to a public office.² But *contra*, *People v. Stevens*,³ Against *judicial* officers or officers invested with discretionary powers, the writ can only direct them to proceed to act, but against *ministerial* officers it may not only direct them to act, but also, *how* they shall act;⁴ as in the case of a board of canvassers to proceed and canvass the votes by the face of the returns.⁵ When an officer is clothed with a merely ministerial discretion, the fact that he has exercised such discretion will not prevent the issue of a mandamus to compel him to do the act in a different manner, if the act must be done, and the discretion does not extend to deciding whether it shall be done or not. Thus, where a railroad company crossing a highway with its railroad was required by law to restore the highway across or along which it had been laid, it was held that if it elected to restore the highway in a particular manner, which proved ineffectual, this would not prevent the commissioners of highways from invoking the aid of a mandamus to compel them to make the restoration effectual.⁶ A mandamus will lie to compel the commissioner of jurors to strike off the name of a person who, under the statute, is entitled to have his name stricken off. It is true he is required to hear and determine excuses, but when the excuse is a *legal* one, he cannot refuse to allow it, and the fact that he is required to hear and determine the sufficiency of such excuse is not a judicial act within the rule relating to mandamus.⁷ In order to warrant a mandamus to compel a judicial body to act, there must be not only a clear legal right to have a decision in respect

¹ 2 Head (Tenn.), 650.

² 20 Texas, 516.

³ 5 Hill, 616; 18 Mich., 400.

⁴ 1 Edm. Sel. Cas., 505.

⁵ 1 Fla. Sup. Ct. Dec., 1876.

⁶ 58 N. Y., 152.

⁷ 80 How. Pr., 78.

to the thing sought, but also to the thing itself.¹ Where a board of supervisors have a discretion as to how much shall be allowed upon a claim, a mandamus will not lie to compel them to allow more than they deem proper,² but when the claim of the party is fixed by law, as the salary of an officer, they may be compelled to allow the entire claim.³ A mandamus will not lie against any disbursing officer to pay a claim until the amount has been fixed as provided by law,⁴ nor unless there are funds in his hands to meet the claim.⁵ A mandamus will not lie to compel a county treasurer or the comptroller of a city to pay the salary of an officer or any claim against the body they represent, if any legal steps remain to be taken before such officer can be required to pay, as if the law requires that the claim shall be audited, until it has been audited.⁶ His legal right to have the act done must be clear. A mandamus will not issue to compel the comptroller to borrow money as required by law to pay a debt when the party has a remedy by action.⁷ In an application for a mandamus to compel a State treasurer, or other State or municipal disbursing officer, to pay a claim, it should be alleged that all legal steps have been taken necessary to warrant the officer in paying it; and to sustain the mandate, it should appear that there are funds in his hands proper to be applied in its payment.⁸ A mandamus lies to compel a gas company to furnish gas to the relator as required by statute, he complying, or offering to comply with the general conditions on which the company supplies others,⁹ to compel restoration of member of a commercial associa-

¹ 44 Barb., 148; 32 N. Y., 473.

² 51 N. Y., 401.

³ 30 How. Pr., 173; 20 N. Y., 252; 8 N. Y., 319; 51 N. Y., 401; 85 N. Y., 323; 33 N. Y., 473; 45 N. Y., 196.

⁴ 18 Abb. Pr., 100.

⁵ 2 Abb. N. S., 315.

⁶ 58 N. Y., 295; 5 id., 65; 46 id., 9.

⁷ 66 Barb., 630.

⁸ 39 Ind., 411.

⁹ 1 Abb. Pr. (N. S.), 404.

tion; ' to restore one to membership in a corporation from which he had been improperly expelled.' It will not lie to restore one to membership in an ecclesiastical body after his expulsion by a trial conducted according to the rules adopted by it for the admission and discipline of members.' Mandamus denied to review act of commanding officer in discharging private on surgeon's certificate of disability, and the court of appeals declined to review the decision of the General Term because it was in its discretion.' A town collector may be compelled to pay over moneys collected by him by mandamus; and he cannot question the constitutionality of the act under which the tax collected was assessed, nor excuse his non-performance of duty upon the ground that the tax is illegal. When a mandamus is issued to a board of audit to compel it to audit an account, the court cannot compel them to allow it, nor fix the sum at which it shall be allowed.' Nor, when the act is at all judicial, can an officer be compelled by mandamus to perform it in a particular way. Thus, where a mandamus was ordered to compel officers to designate four papers having the largest daily circulation, it was held that the court could not direct *which* papers should be designated, but only could put the board in motion.' But if the statute provides how the papers shall be selected, mandamus lies to compel the board to give the printing to the papers selected by the statutory mode. On appeal from an order granting a mandamus compelling the defendants to award a contract to the relator, which they had refused to do, the court will assume that there was no other reason for refusal than the reason which is stated by the judge to have been the one on account of

¹ 8 Hun, 16; 24 How., 216; 18 Abb., 271.

² 55 N. Y., 180.

³ 8 Hun, 361; 44 How., 468.

⁴ 53 N. Y., 103.

⁵ 77 N. Y., 595.

⁶ 2 Abb. Pr. (N. S.), 78.

⁷ 39 Barb., 651.

which the relator's bid was rejected.¹ And the court will not, upon appeal, reverse the order, on the objection that the defendants no longer have it in their power to perform the duty required of them. That objection should be presented to the consideration of the court below, before the writ is awarded; and it was so presented in the cases in which the objection has been sustained.² A writ of mandamus to compel the award of a public contract is, to some extent at least, in the discretion of the court to grant or refuse; especially where no property of the relator has been taken or affected, and his claim rests altogether upon the interest of the state to have its work done by the lowest bidder, and not upon a legal right on his part.³ The fact that the act required by the mandamus cannot be done without the taking of legal proceedings by the defendants, will not prevent the issue of the mandamus, when the duty to do the act is clear, and the right and duty to institute proceedings for the purpose covered by the mandate is also clear. This is not an impossible or unlawful act, and it matters not what steps the defendant may be compelled to take, if it is his duty to take them, the mandamus will be issued.⁴ In such a case, if, without any fault or *laches* on the part of the defendant, he failed in the legal proceedings, it would be a good answer to any proceedings for contempt. Indeed, any defense existing at the time of the return is available. It is simply enough, if a legal excuse for not doing the act exists.⁵ A mandamus is a proper remedy to compel an officer or public body to do an act which it is the duty of such officer or body to do, and which the person applying has a right to have done, and where he has no other conveni-

¹ 46 Barb., 254.

² *Id.*

³ 27 N. Y., 378; 88 *Id.*, 388.

⁴ 58 N. Y., 152.

⁵ 1 T. & C., 193.

ent or effectual remedy.¹ Thus, a mandamus lies to a board of audit to compel it to audit a claim required by law to be audited by it,² and to admit the claim, if legal, as a county charge, but the writ will not be used to control the exercise of their discretion as to the amount that shall be allowed;³ and generally to compel a board of supervisors or audit to examine accounts when their refusal to do so is predicated upon reasons other than that the accounts are erroneous or insufficiently sustained by proof.⁴ So, where supervisors erroneously refuse to renew a license for a ferry; to compel them to levy a tax;⁵ or to reduce a tax imposed on real estate when by statute the power and duty to do so in proper cases is conferred, and generally in all cases where public officers refuse or neglect to perform a statutory or official duty, or to conform to the law in discharging their duties, and a particular party is affected thereby, he may have his remedy by mandamus.⁶ Mandamus lies to enforce contract for lighting, made by town auditors under special statute;⁷ to compel village trustees to raise by tax money for union schools;⁸ to compel commissioners to pay to bondholders money raised by a town under law directing it to be so paid, although there was a remedy by action against the town;⁹ to compel town collector to pay over to commissioners money collected from tax under special act, although he had wrongfully paid it to the supervisors.¹⁰ Mandamus refused to compel district school inspector to audit salary of teacher, as

¹ 7 Cal., 286; 19 Barb., 468.

² 32 N. Y., 473; 28 Cal., 421; 24 How. Pr., 119; 6 N. Y. Supp., 591; 58 Barb., 555; 4 Hun, 94; 82 N. Y., 80.

³ 19 Johns., 259.

⁴ 21 How. Pr., 322.

⁵ 32 Penn. St., 218; 12 Iowa, 237; 17 Ohio St., 608.

⁶ 12 How. Pr., 224.

⁷ 59 N. Y., 228.

⁸ 54 Barb., 480.

⁹ 24 N. Y., 114.

¹⁰ 55 N. Y., 180.

there is a remedy at law;¹ also, to review discretion of trustees of common schools.² Obedience to a village ordinance cannot be enforced by mandamus.³ A mandamus lies to compel a board of supervisors to levy a tax to repay a sum collected as a tax contrary to law which the legislature have directed them to repay.⁴ So it lies to compel a county treasurer to issue his warrant for the collection of a tax, and it may be instituted by any citizen having a common interest in the collection of the tax.⁵ Although where money has been raised by municipal corporations for the express purpose of paying a demand which would not be enforceable, and the money is in the hands of officers with directions to pay it, an action will lie against such officers to have the money so applied, the court will not, by mandamus, at the suit of a party having no right, compel an officer to raise or procure the money for the purpose of making such payment.⁶ Thus it has been held that a mandamus would lie to compel the proper authorities to assess a tax to pay the interest on their bonds, they being authorized by statute to issue the bonds and required to levy a tax to pay the interest thereon;⁷ and where the writ issues from the United States courts, it is no answer to the writ that they have been enjoined by a State court from doing the act. So it lies to correct an assessment, under an order of the county court;⁸ to compel assessors to ascertain whether the requisite consents to issue town bonds had been given, and if so, to make the affidavit under the statute, but they cannot be compelled to make the affidavit absolutely no matter how clear the evidence of amount.⁹ It will not

¹ 44 How., 322.

² 18 Abb., 165.

³ 11 Hun, 297.

⁴ 36 How. Pr., 1.

⁵ 37 N. Y., 344.

⁶ 36 N. Y., 224; S. C., 34 How. Pr., 264.

⁷ 6 Wall. (U. S.), 166; 24 How. (U. S.), 376; 5 Wall. (U. S.), 705; 4 Id., 535.

⁸ 65 N. Y., 800.

⁹ 43 N. Y., 457.

lie to compel assessors to make oath to their roll that they estimated real estate at its full value, when it appears that in fact they did not so estimate it.¹ Mandamus lies to compel the board of excise commissioners to determine a complaint for violation of the excise law;² to compel public officers, who have advertised for proposals for a contract, to award the contract to one who is the lowest bidder, and has clearly conformed, in substance, to the requirements of the case. In such case there is no discretion left to the defendants, but the bidder is entitled to the contract as a matter of law.³ This remedy is not defeated upon the theory that the State is the defendant, and that a party cannot sue the State. For this purpose, the State is not the defendant, but certain ministerial officers who are bound to perform their duties.⁴ It may be granted to compel the clerk of a municipal corporation to execute a contract under the seal of the corporation;⁵ but it is not the proper remedy to test a claim to the office of president of a board of public officers; the claim of the possession of the books and papers should be tried by the proceedings provided for that purpose by statute; and the title to the office should be tried by an action of *quo warranto*;⁶ nor will it lie to compel clerk of board of supervisors to recognize relator as a member of the board and record his vote, the clerk has no control of the proceedings.⁷ It lies to compel a county treasurer to pay the amount of a claim audited and allowed by the proper board.⁸ To compel the issue of a warrant of distress against delinquent collectors of taxes.⁹ A mandamus will not lie to

¹ 55 N. Y., 252.

² 31 N. Y. St. Rep., 928; 30 Id., 394.

³ 46 Barb., 254.

⁴ Id.

⁵ 2 Abb. Pr. (N. S.), 315.

⁶ 2 Abb. Pr. (N. S.), 348.

⁷ 68 N. Y., 467.

⁸ 41 Me., 15; 19 Barb., 468.

⁹ 5 Pick. (Mass.), 323.

compel a person to take an oath, when the taking of such oath would involve falsehood or perjury on his part. Thus, it was held that a mandamus would not lie to compel assessors to make an oath to their assessment roll, stating that they had assessed the value of real estate in a certain way, as required by law, when in fact they had not so assessed it.¹

It lies to compel the trustees or committee of a school district to levy a tax to pay a judgment against the district;² it lies to compel an entry taker of a county to receive land entries wrongfully refused;³ to compel a clerk to issue an execution;⁴ to compel a sheriff to appoint appraisers to set apart exempt property;⁵ to compel a county clerk to affix the county seal to county bonds, whether issued by himself or his predecessor.⁶ It has been held that a mandamus lies to compel the officer upon whom the duty is imposed to approve the bonds of an officer, if in due form for the proper amount, and with sufficient sureties. But if the officer is made the judge of the sufficiency of the sureties, quere;⁷ and undoubtedly correct, as an officer cannot be compelled to approve a bond, it necessarily involves the exercise of a discretion;⁸ to compel board of assessors to rectify an error in their assessment list, as they were authorized to do by statute;⁹ to compel a court to recognize a legally elected and duly qualified district attorney;¹⁰ to compel an officer to comply with his statutory duties, as a register on going out of office, to deposit his books with the county clerk;¹¹ to compel a justice of the peace to make

¹ 55 N. Y., 252.

² 34 Iowa, 510.

³ 4 Heisk. (Tenn.), 122.

⁴ 3 Abb. (N. Y. App. Dec.), 491.

⁵ 2 Neb., 7.

⁶ 34 Iowa, 175.

⁷ 48 Ala., 886, *contra*.

⁸ 44 Miss., 393.

⁹ 30 N. Y. St. Rep., 79.

¹⁰ 1 Cal., 352.

¹¹ 27 Ark., 106.

a true record of a matter heard before him.' A person who has been unlawfully deprived of membership in a corporate society may be restored by mandamus;¹ so the two branches of a city council may be compelled by mandamus to meet in convention as required by the city by-laws to appoint a commissioner of streets;² so to compel a board to receive assessments to meet and confirm assessments made by the board established for that purpose, which they refused to confirm under the erroneous belief that they had no jurisdiction;³ so to compel defendant to supply water to such persons as will pay the charge and rates therefor.⁴ When an officer required by law to do a certain act upon a certain day, or on or before a particular day, gives notice before the day that he does not intend to perform the duty, this dispenses with the necessity of a demand, and is sufficient evidence of refusal. As, where it is the duty of an officer on or before a certain day to levy a tax to pay the interest on bonds, if, before the expiration of the time, he gives notice that he will not levy the tax, mandamus lies to compel him to do so.⁵ When a jury agrees upon a verdict, reduces it to writing and brings it into court, and the court refuses to receive it, a mandamus is the proper remedy to compel its reception.⁶ When an auditor refuses to issue a warrant upon an order of the supervisors, mandamus is the proper remedy, even though action lies therefor upon his official bond, because a remedy by action is not a *plain, speedy and adequate* remedy within the meaning of the rule excluding this summary remedy.⁷ A referee, commissioners of highways and all officers of bodies vested with judicial powers, who are charged with the

¹ 38 Conn., 105.

² 6 T. & C., 85.

³ 111 Mass., 90.

⁴ 6 T. & C., 127.

⁵ 30 N. Y. St. Rep., 704.

⁶ 4 S. C., 430.

⁷ 9 Kan., 608.

⁸ 47 Cal., 488.

duty of reporting the result of their action to the court, or to any specified body, can, after they have completed their judicial duties, be compelled by mandamus to make, sign and file their report. But if they are entitled to have their fees paid, they must be tendered to them before the writ is applied for.¹ An auditor cannot question the title of the municipality he represents, to lands upon which buildings are being erected by it, and refuse to pay a warrant properly drawn upon him upon the ground that it has no title to the lands, and the money called for by the warrant is for the erection of such buildings. It is his duty to pay warrants legally drawn and a return to a mandamus setting up such facts is insufficient.² But it seems where a mandamus is obtained to compel a treasurer of a city to pay the salary of an officer, that it is a good answer to the writ, that there is another person who claims to hold the office, and who is in discharge of its duties, and the court will not, in such proceedings, decide the *title* to the office.³

A mandamus is the proper remedy to compel a county to issue its bonds in pursuance of its subscription to the capital stock of a corporation. Indeed, it would seem to be the only remedy;⁴ to compel a corporation to transfer its shares, unless there is an adequate remedy by action;⁵ or to perform statutory duties. Thus, when a railroad company had by act of the legislature received aid from the county in the construction of its road, and the act provided that it should tax receipts in payment for freight, it was held that mandamus would lie to compel them to take them.⁶ Where the common council of Long Island City overrules the veto of the mayor to a resolution awarding a contract, which is performed, such action of the common council binds the city, and mandamus will lie to compel

¹ 4 T. & C., 398.

² 47 Cal., 488.

³ 55 N. Y., 252; 70 N. C., 93.

⁴ 12 Kan., 127.

⁵ 110 Mass., 95; 44 Cal., 173.

⁶ 5 Heisk. (Tenn.), 125.

the mayor to sign the warrant for the discharge of the indebtedness.¹ A peremptory mandamus cannot be granted requiring the appointment of an honorably discharged union soldier to the office of collector of taxes.² It will lie to compel vestrymen to attend duly called meetings of the vestry, when it is shown they intentionally absent themselves; that such meetings are necessary and cannot be held without them, and motion for the writ may properly be made by the rector.³ Mandamus lies to compel county or city authorities to pay fees legally due to the clerk of courts. Such fees are not in any sense discretionary;⁴ to compel the payment of a dormant judgment against a city;⁵ against a teacher of a public school, or against a school committee, trustees or other officers having control of the matter, to compel the admission of a person legally entitled thereto, as a scholar.⁶ When a corporation fails to discharge its duties according to the requirements of its charter, or the statutes of the State, it may be compelled to do so by mandamus on the relation of any person having a special interest therein. Thus it has been awarded to compel a railroad company to run its cars to a particular point, and there to receive and discharge passengers. It has ' been ordered to compel a turnpike company to fence its road;⁷ to restore a highway to its former width;⁸ to establish a uniform rate of tolls;⁹ to build a bridge;¹⁰ to reinstate its road after the rails have been taken up;¹¹ to bridge a private

¹ 30 N. Y. St. Rep , 351.

² 30 N. Y. St. Rep., 52; see, also, Id., 614, 286.

³ 30 N. Y. St. Rep., 651.

⁴ 6 Ill., 481; Id , 413.

⁵ 71 N. C., 260.

⁶ 48 Cal., 86.

⁷ 29 Conn., 538; 24 N. Y., 627.

⁸ 1 Q. B , 860.

⁹ 2 Rail. C., 694.

¹⁰ 6 Q. B., 898.

¹¹ 7 Metc. (Mass.), 70.

¹² 2 B. & A., 646.

way;¹ to compel the performance of the duty of the common council to order an election to fill a vacancy, and any voter is a proper relator;² will not be awarded to compel municipal corporation to confirm assessment of damages as there is another remedy;³ or to compel payment of expenses in street openings;⁴ but granted to compel city to complete widening of street.⁵ The contracts made by defendants with relators provided that defendants would cause estimates and measurements of the materials furnished and work done, to be made monthly, and pay a percentage thereon and the balance on the measurement in the wall. This was done and vouchers given, on which partial payments were made and the vouchers returned to defendants. Held, that the making of certificates in which final payments could be obtained, was within the official duty of the defendants, and could be enforced by mandamus.⁶ A mandamus was applied for to compel a railroad company to receive the goods of the relator, and only refused upon the ground that the company was not, by its charter and custom, carriers of that kind of goods.⁷ So, too, a railroad company that has built its road or executed any of its works contrary to the requirements of its charter, may be made to conform them to the method prescribed by its charter on the relation of a party interested therein, but a specific demand must be made and be followed by a refusal, or what is equivalent thereto.⁸ Mandamus lies to compel a board of canvassers to comply with statutory requirements, and to make returns to the office or

¹ 26 Ga., 283.

² 77 N. Y., 503.

³ 1 Wend., 318.

⁴ 1 Hun, 1.

⁵ 23 Barb., 404.

⁶ 28 N. Y. St. Rep.,

⁷ 7 Dowl. P. C., 566; 2 Shelford on Railways, 846.

⁸ 4 Q. B., 162; 2 Id., 64.

board to whom by law such returns are to be forwarded.¹ Inspectors of election act in a ministerial capacity only, and are not absolved from their statutory duty to sign the returns, because they have reason to believe that some of the votes in the lot were fraudulently cast, or have been illegally deposited; and when they refuse to sign the returns on such grounds, a mandamus may be granted to compel them to do so.² And so in all cases where the act is purely ministerial, and the duty is plain, its performance will be compelled at the suit of a proper party.³ In England mandamus will not be granted to determine the right to a public office, *quo warranto* being the proper proceeding;⁴ and the test of the applicability of a *quo warranto* are the source of the office; its tenure and the duties. In all cases where they are of a public nature, the office is a public office.⁵

A mandamus is a proper remedy to compel a board of registration to admit the name of the relator to the registry—after demand and refusal—but it must clearly appear that the relator was and is entitled to registration, and that the board have power to admit his name in obedience to the mandate. The fact that an action lies for the injury is no objection, as damages from the deprivation of such a right are not susceptible of proper estimation.⁶ So, to compel a person to discharge the duties of a public office to which he has been elected;⁷ and the fact that the statute imposes a fine for such refusal, and the return states that the fine has been paid, is no answer unless it is also shown that the fine is in lieu of service;⁸ nor the fact that the person elected had not, in all re-

¹ 4 S. C., 485; 2 Civ. Pro. R., 452; 64 How. 201; 12 Abb. N. C., 77; Id., 84; Id., 95.

² 27 N. Y. St. Rep., 39.

³ 39 Texas, 83; 40 Id., 537; 40 Id., 601.

⁴ 17 Q. B., 149.

⁵ 13 Cl. & F., 520.

⁶ 9 Ad. & El., 670; 1 G. & D., 28.

⁷ 3 Doug., 237; 1 B. & C., 585; 6 M. & S., 277; 3 Hill, 42; 4 Abb., 35; 8 Hun, 97; 47 How., 494; 16 Abb., N. S., 219; 60 N. Y., 642.

⁸ B. & C., 585.

spects conformed to the requirements of the statute, to entitle him to discharge the duties of the office.¹ When a cause has been improperly removed from the calendar, a mandamus will not generally lie to restore it, particularly if it was removed upon motion or by order of the court in the exercise of its discretion, or if the court has a discretion as to whether it shall be restored or not, and has exercised that discretion adversely to its restoration;² nor will the court issue a mandamus when the act sought to be enforced has been enjoined by a court of competent jurisdiction, in proper proceedings;³ but when one who is not a party to the injunction proceedings has rights which can be secured only by mandamus, it may be issued notwithstanding the injunction.⁴ A person cannot be compelled to do an act when he is invested with discretion whether to do it or not, or how he will do it. Thus, when the statute provided that the regents of the university might, in their discretion, install two professors of homœopathy in the department of medicine in the university, it was held that they could not by mandamus be compelled to do so.⁵ It will not lie to compel the doing of any act, in reference to the doing of which or not the defendant is invested with a discretion, nor to direct how an act shall be done when the defendant is invested with a discretion as to the *method* of doing it.⁶ It will not issue to compel the discharge of a prisoner, upon the ground that he has once been put in jeopardy for the same offense. He must avail himself of this as a ground of defense upon another trial;⁷ nor to compel the granting of a license to do any act where they are

¹ 6 M. & S., 277.

² 63 Me., 396.

³ 13 Kan., 92.

⁴ 12 Kan., 127.

⁵ 30 Mich., 473; 40 Tex., 537.

⁶ 26 Mich., 146; 53 N. Y., 108; 19 Minn., 103; 22 Hun, 286; 13 Abb., 374.

⁷ 45 Cal., 248.

invested with *any* discretion in reference to the matter, which may be inferred from the purpose of the act;¹ nor to compel the doing of an act when the statute of limitation has run, and in determining that question reference is to be had to the time when the right on the one hand and the duty on the other attached, and not to the time when the demand was made.² An auditor cannot be compelled to audit a claim that is not a legal charge against the body he represents;³ nor can a treasurer be compelled to pay a warrant drawn on the treasury when any steps remain to be taken before he can pay it legally, or when the requirements of the statute, the lawful rules of the department, or the by-laws of the corporation have not been complied with.⁴ Thus, a State treasurer cannot be compelled to pay money by mandamus, except when he has the money with which to meet the claim and illegally withholds it, and the same rule applies in the case of all disbursing officers. A legal claim on the part of the plaintiff, and ability to pay, and an illegal refusal to do so, must be established. If there is a reasonable excuse for not paying, payment cannot be enforced, and as to what is or is not a legal excuse will depend upon the circumstances of the case.⁵ A State treasurer cannot be compelled to pay money which the legislature has directed him to pay, when the legislature had no constitutional power to direct the payment;⁶ but if a warrant is legally drawn, and there are funds with which to pay it, a mandamus will lie to compel the payment;⁷ nor will a corporation or public officers be compelled to go on with a work, when there are not funds, or means for raising them, in

¹ 45 Ind., 501.

² 13 Q. B., 484; 34 Iowa, 175.

³ 47 Vt., 250.

⁴ 49 Cal., 422; 37 N. J. L., 84; 56 N. Y., 476.

⁵ 26 La. An., 127; 49 Cal., 512.

⁶ 72 N. C., 5; *id.*, 275.

⁷ 49 Cal., 303.

their hands sufficient to do what is required.¹ The assessors, by mistake, included in the assessment roll for a local improvement lands of relator, situate outside the assessment district as fixed, held that this was a clerical error; that it was the duty of the assessors to correct the list, and that mandamus would lie to compel them to do so.²

A private citizen, asking for a mandamus against a city council or other public body, must show a right independent of that which he holds in common with *all* the public. He must show some special personal interest therein.³ In *People v. Green*,⁴ the relator, a private citizen, prayed for a mandamus to compel the defendant, who was a county officer, and had removed his office from the former county seat to a place to which he claims the county seat has been changed, it was held that a mandamus to compel his removal of the office to the former county seat could not issue upon his relation, because the petition did not show any *special* or *particular* interest in him in reference to the matter, except such as existed in behalf of *all* the public; also because it did not appear that any demand had been made for such removal, followed by a refusal on the part of the officer. When a person applies for a mandamus to compel the performance by a public officer of a duty in which others are equally interested with himself, the fact that others may be benefited thereby is no objection to his right to proceed by mandamus; but he should proceed entirely upon *his own right*, and cannot derive any aid from the right of others, nor can he claim any thing for others. Thus, when the relator or plaintiff applied for a mandamus to compel the comptroller to levy a tax to pay the interest on certain State bonds, of which the plaintiff was the holder of only one, it was held that

¹ 30 Mich., 353.

² 27 N. Y. St. Rep., 279.

³ 9 Phil. (Penn.), 481.

⁴ 29 Mich., 121.

his remedy was confined to that particular bond, and could not be extended to include others of the same class.¹ The writ should issue against the person or body upon whom the duty by law devolves. Thus, when a mandamus was prayed for to compel the clerk of the common council of a city to amend his record so as to show the appointment of the plaintiff as policeman, it was held that neither the common council nor the city were necessary, or even *proper* parties thereto. The duty entirely devolved upon the clerk, and he alone had authority or power to do the act prayed for, consequently was the only party who could properly be commanded to do the act, and the fact that the change in the record would prepare the way for the displacement of another policeman, or to make the city chargeable for his services if he should assume the office, does not affect the question.² It lies to compel clerk of municipality to affix seal to contract;³ to compel commissioner of jurors to strike off the name of a person entitled.⁴ Mandamus will not lie to prevent the payment of money from one fund that should properly be paid from another;⁵ nor to compel a merely private person to deliver up papers or books to public officer or other person, although such books and papers were made under order of the court and paid for by the county. In such case there are other ample remedies if the person has no legal claim to the documents;⁶ nor to enforce obedience to a writ of *habeas corpus*.⁷ The fact that the officer sought to be mandamus-ed predicated his refusal to do the act upon a particular ground, does not prevent him from giving and relying upon other grounds as an answer to the writ. Thus, where a writ of mandamus was applied for

¹ 4 S. C., 430; 45 Cal., 60; 11 Kansas, 66; 25 La. Ann., 622.

² 41 Conn., 448.

³ 2 Abb. N. S., 315.

⁴ 1 Abb. N. S., 200; 30 How., 78.

⁵ 58 Mo., 276.

⁶ 58 Mo., 571.

⁷ 66 Ill., 59.

against the teacher of a public school to compel him to admit the plaintiff to the school, it appeared that when the demand for admission to the school was made, he predicated his refusal upon the ground that the plaintiff was a person of color—a negro—but in answer to the writ, he set up that the plaintiff had not the requisite qualifications of learning to enter that school. It was objected that the return was bad because it set up a different ground than that upon which the refusal was predicated when the demand was made upon him, but the court held that the rule, that a party who bases his refusal to do an act on some defect in the proceedings of his adversary, will not afterward be permitted to allege a new or additional defect, does not apply in such a case.¹

The validity of a claim must be settled in order to warrant a mandamus to compel its payment by a public officer. Its validity cannot be tried, nor can it be examined on a hearing for a mandamus. In such cases the courts only interfere when the relator's right is clear and indisputable. If any thing remains to be done, to fix the liability of the corporation to pay, even though it is a mere matter of computation, if such computation is required to be made by a particular officer, the court will not interfere;² nor to compel the removal of obstructions in a highway, where the statute has provided a remedy by indictment;³ nor to compel the payment of money due for labor performed for a municipal corporation;⁴ nor to compel a judge *a quo* to reduce the amount of a bond as fixed by him to set aside a sequestration. The act is judicial, and he cannot be compelled to act contrary to his judgment or discretion;⁵ nor to require the dismissal of a cause for want of jurisdiction over the person of the de-

¹ 48 Cal., 36.

² 5 T. & C., 382; 49 Miss., 311.

³ 66 Ill., 337.

⁴ 37 N. J. L., 84.

⁵ 26 La. Ann., 116.

fendant, when such person has appeared in the action or in any wise submitted to the jurisdiction.¹ The fact that the plaintiff or relator is a member of a board or partnership whose action he seeks to enforce does not deprive him of the remedy by mandamus. The rule in reference to ordinary civil actions does not apply.² Where a person indicted, tried and convicted of a crime escapes, and is not in custody either actual or constructive, he cannot apply for a mandamus to compel the sealing of a proposed bill of exceptions;³ nor to settle a bill when there is a dispute as to the incidents of trial. The judge's determination as to what occurred upon the trial is conclusive on such an application.⁴ In *Douglass v. Loomis*,⁵ it was held that a mandamus requiring a judge to certify to a bill of exceptions, that the bill which he is required to certify does not truly state the facts, is sufficient to defeat the writ. An escaped prisoner cannot take any action before the court. If he seeks its aid, he must come within and submit to its jurisdiction. It would be a novel spectacle for a court to exercise its jurisdiction and power in favor of one who defied it and is in actual contempt.⁶ The mandatory clause of a writ must be specific, certain and definite, and must not command more than it is the legal duty of the defendant to do, and must not trench upon his discretionary power, if he has any, as, if the mandate is uncertain, or commands more than the defendant is legally bound to do, or interferes with his discretion, the writ will be bad, and will not be sustained upon appeal.⁷ The mandate should be so certain and definite that the defendant will not be required to look beyond the writ to ascertain his duty; and the facts upon which the relator relies must

¹ 30 Mich., 10.

² 88 Iowa, 440.

³ 59 N. Y., 80.

⁴ 4 T. & C., 1.

⁵ 5 W. Va., 542.

⁶ 17 Q. B., 503; 31 Me., 592; 97 Mass., 545; 14 Gratt. (Va.), 677.

⁷ 57 Ill., 142; 60 Me., 276.

be set forth so definitely and fully that the defendant can take issue thereon.¹ A motion for a writ, notwithstanding the answer, amounts to a demurrer and admits its truth.² The fact that the relator was not entitled to the writ when applied for, but was entitled to it when the application was heard, will not permit its issue. If at the time of final hearing, even though upon appeal, the relator becomes entitled to the writ without regard to the question whether he was entitled to it when issued.³ The judgment of a court making a writ of mandamus peremptory is a final judgment, and cannot be vacated or set aside on a rule taken by the defendant.⁴ A writ of mandamus will not lie to restore a member of a religious society, who has been expelled according to its rules and discipline for moral delinquency. The courts have no control in the matter, the society having power to make its own by-laws and rules for the admission and discipline of its members, and even though the society has no right under the statute to try a corporator for moral delinquency, and cannot by such, or any action, deprive him of his rights as such, yet, having an adequate remedy at law, it cannot proceed by mandamus.⁵ When a public office is vacant and a party has been elected to fill the office, the court will, by mandamus, enforce the right to the office;⁶ but where the office has been created by charter, or by statute, and is not vacant, but has been usurped by an intruder,⁷ and the right to the office is disputed between two rival claimants, the right must in general be tried by *quo warranto*, and not by mandamus.⁸ If, however, there is only a

¹ 52 Mo., 89.

² 48 Cal., 36.

³ 81 Wis., 257.

⁴ 24 La. Ann., 133.

⁵ 53 N. Y., 103.

⁶ 35 Barb., 527, 535, 541.

⁷ 5 Hill, 516; but see 2 Barb., 397; 68 N. Y., 467; 80 Id., 185; 59 How., 106; 55 N. Y., 217.

⁸ 7 Ad. & El., 222; 13 Cl. & F., 520.

colorable election, it is void, and a mandamus to hold an election will be granted.¹ And there are occasions where a *quo warranto* will lie, and yet the remedy by mandamus may be deemed a more appropriate remedy.² Wherever a person has been properly appointed to a corporate office, having a salary annexed to it, or has been duly elected, to office, and the corporation refuses to institute him, a mandamus lies to compel them to do so;³ but the court will not interfere where it will have to unravel the rights of voters who are alleged to have been themselves unduly elected, and to have had no right to vote.⁴ It lies to put a minister of any religious sect in possession of a pulpit of which he is unjustly deprived.⁵ A person may be restored to an office from which he has wrongfully been expelled or removed by mandamus;⁶ but his title to the office cannot be settled in such proceedings, only the *prima facie* rights of the parties. The proper remedy by which to determine the actual title to an office is by *quo warranto*.⁷ Mandamus lies to compel a railroad or canal company to build and repair bridges which by law they are bound to build,⁸ and to pursue the course prescribed in their charter, in crossing streams and water-courses, so as not to impede navigation;⁹ to compel the president of a corporation to do any act imposed upon him by the charter, which affects the public interest;¹⁰ to compel the cashier of a bank to allow a bank director to examine the discount book;¹¹ and generally to discharge

¹ 7 Ad. & El., 222; 6 Id., 353.

² 44 Penn. St., 336; 23 Md., 482; 4 Nev., 400.

³ 1 W. Bl., 551.

⁴ 8 Ad. & El., 564.

⁵ 4 H. & J. (Md.), 429; 2 Barb., 377; 4 Mo., 26.

⁶ 4 Term. Rep., 125; 2 Ld. Raym., 959; Id., 1265; Id., 1334; H. & M. (Va.), 1; 9 Wis., 254; 2 Bay (S. C.), 105; 8 Nev., 202; 1 Ill., 25.

⁷ 5 Ill., 615; 18 Mich., 338; 7 Ga., 478; 29 Ill., 413; 2 Minn., 180; 10 Week. Dig., 88.

⁸ 57 How. Pr., 327; 26 Ga., 665.

⁹ 9 Rich. (S. C.), 247.

¹⁰ 23 Md., 296.

¹¹ 12 Wend., 183; 1 How. Pr., 247.

any duty imposed upon it by law.¹ As to deliver at a particular elevator on its line, whatever grain in bulk may be consigned to it. To so grade its track in passing through streets or alleys, as to render the streets, alleys and crossings easy and convenient of access; to complete its railroad when bound to do so by law; to build a bridge as required by statute.² The writ is available, also, for the purpose of enforcing performance of the duties imposed by charter, custom or contract on a body corporate in favor of particular members thereof.³ Where there is a dispute and matter of controversy between the corporation on the one hand, and one of its members on the other, respecting the corporate rights and privileges of the latter, a mandamus may be obtained at his instance against the corporation, commanding them to allow him to inspect the corporate records, by-laws, minute-books, and other documents relating to the matter in controversy, to see whether he can make out a case in his favor, and initiate proceedings against the corporation with a prospect of success.⁴ But the court will not grant a mandamus for a general inspection of all records, muniments, etc., but only of such as relate to the particular matter in controversy.⁵

Mandamus is the proper remedy to compel the incumbent of an office to deliver the books, papers, property, and insignia of his office to his successor;⁶ providing the applicant's title to office be clear and free from reasonable doubt;⁷ as to compel a person whose term of office as mayor has expired, to deliver up to his successor the seal, books, papers, muniments, etc., the property of the city, properly belonging in the custody of the mayor;⁸

¹ 56 Ill., 365; 37 Ind., 489; 18 Minn., 40; 11 Abb., N. S., 4; 61 Barb., 397; 76 N. Y., 294; 28 Hun, 543; 63 How., 291.

² 70 N. Y., 569.

³ 7 Abb. N. C., 121; 1 Abb., N. S., 404; 30 How., 87; 32 N. Y., 187.

⁴ 31 L. J. Q. B., 62.

⁵ Id.

⁶ 19 N. H., 215; 7 Cush. (Mass.), 226.

⁷ 5 Hill, 616.

⁸ 15 Ill., 492; 25 Id., 325.

so to compel the delivery to the selectmen of the town, the books, papers and property belonging to an office, in the hands of persons who have usurped it; to compel a town clerk to deliver the records of the town to his successor;¹ to compel ex-officers of a church or other corporation to deliver up the books and property pertaining to his office, to his successor,² so to compel an officer of a benevolent association, who had a lien on its books to allow an inspection of them.³ So it is a proper remedy to restore an inspector of tobacco to the office from which he has been irregularly removed;⁴ but the *title* to an office cannot be tried under this remedy;⁵ it has been held a proper remedy to restore an attorney to the rolls who had been improperly disbarred by an inferior tribunal.⁶ The courts have refused to grant a mandamus to compel a private individual to give up documents of a public nature, where the party claiming the possession of them had a remedy by action for the conversion or detention of the documents,⁷ but the remedy by action is not an effectual remedy for the recovery of the documents themselves; and wherever a private individual, who has quitted office, keeps back public documents of which he obtained custody whilst acting in an official character or capacity, and by color of his office, the court will, by mandamus, compel the production of the documents, and if private and public documents have been so mixed up together that they cannot be severed, the whole must be produced.⁸ Thus, a mandamus will be granted to a person who has previously served the office of town clerk, directing him to deliver up records and books connected with the admin-

¹ 2 Pick. (Mass.), 397.

² 7 Cush. (Mass.), 226.

³ 8 Abb. N. C., 342.

⁴ 2 Bay (S. C.), 105; 3 H. & M. (Va.), 1; 9 Wis., 254; 20 Tex., 516; 2 Head (Tenn.), 650; 35 Barb., 535.

⁵ 5 Hill, 616; 18 Mich., 338; 7 Ga., 473.

⁶ 1 Johns. Cas., 181; 7 Wall. (U. S.), 364; 36 Ala., 252.

⁷ 1 Q. B., 169.

⁸ 6 Ad. & El., 399.

istration of public justice in the borough, which came into his custody as town clerk, and to hand them over to his successor in the office.¹ Members of a corporation have no right, on speculative grounds, to call for an examination of the books and muniments, to see if they can fish out of them some complaint or charge against corporate body. It is necessary that there should be some particular matter in dispute between the members, or between the corporation and individuals in it, in which the applicant is interested, and in respect of which the examination becomes necessary.² Granted to compel inspection of books of corporation by officer or stockholder;³ as there is a remedy by action for refusal to transfer stock, mandamus will be refused.⁴ The writ goes also to a corporation or chartered company, to compel it to fulfill the duties it has contracted toward strangers, where there is no other suitable or effectual remedy. A judgment creditor, therefore, of a trading corporation may obtain a mandamus enjoining the corporation to give him inspection of the register of shareholders, if he has no other or effectual means of obtaining such inspection.⁵ There is no practical distinction in this respect between companies existing by statute and companies created by charter. A mandamus, therefore, lies against a company incorporated by statute, commanding them by the hand of their secretary to enter on their books, or to register, the probate of the will of a deceased shareholder.⁶ Also transfers, or memorial of transfers, of shares.⁷ But if the prosecutor of the writ of mandamus is not proceeding *bona fide* for the purpose of enforcing his rights as a shareholder, and has no interest himself as one of the public in the performance of the thing

¹ 1 Wils., 305; 1 W. Bl., 49; 2 Str., 879.

² 2 B. & Ad., 115; 11 Hun, 1; 70 N. Y., 220.

³ 50 Barb., 280; 3 Abb., N. S., 364; 34 How., 193.

⁴ 6 Hill, 243.

⁵ 3 El. & Bl., 784.

⁶ 1 M. & Ry., 529.

⁷ 17 Ad. & El., Q. B., 645.

which he seeks to have done, he is not entitled to the writ.¹ Nor will the court grant the writ at the instance of one of several partners in a trading corporation, who seeks merely to compel the directors to produce their accounts and divided profits, the court of chancery being the proper tribunal for that purpose.² Mandamus is the proper remedy to compel a municipal corporation to levy a tax to pay a judgment against it, where levy cannot be made under the execution;³ so it is the remedy of a creditor against the police department of New York;⁴ so to compel superintendent of incumbrances to remove obstacles in the streets of New York, though placed there by authority of the common council;⁵ so to compel the State auditor to issue his warrant to pay money due from the State for property *delivered* to it under a contract;⁶ so to compel supervisors to raise money to meet a claim against the county, even before the amount has been judicially determined;⁷ but a comptroller of a State or city cannot be compelled to pay a debt against the State or city where there are no moneys in his hands appropriated for such purposes.⁸ In all cases, when there is a legal right in the relator to have the thing done, and a corresponding obligation on the part of the officer, public body or corporation to do it, *and there is no other equally adequate remedy*, a mandamus may issue, and thus it will be seen that the range of the writ, its office and power, is extremely mild and covers a multitude of cases that it would be impossible to enumerate. It may be used to compel a corporation to compel the enforcement of common law or statutory rights, and their number may be legion. It has been held a proper remedy to

¹ 21 L. J., Q. B., 284.

² 2 B. & Ald., 622.

³ 2 Bliss., U. S., 77.

⁴ 83 N. Y., 528.

⁵ 59 How., 277.

⁶ 58 Ill., 90.

⁷ 3 Abb. App., 566.

⁸ 24 La. Ann., 16; 27 Barb., 89; 2 Abb. Pr., N. S., 815.

compel the affixing of a corporate seal to a document; it lies to compel a corporation to transfer stock of a shareholder, but not if there are unpaid assessments due thereon; or any lawful rules of the company have not been complied with;¹ to compel arbitrators to appoint an umpire;² to compel a corporation to send a dispatch, as required by law;³ to compel an officer of a corporation to make an annual report, as required by statute or by the by-laws of the company; to compel police commissioner to allow policemen on trial to have counsel;⁴ to compel board of police to pay surgeon's salary;⁵ to compel reception of minister;⁶ to reinstate a professor in an incorporated college, illegally removed by the trustees;⁷ to compel tax commissioners, or assessors, or whatever body by law is required to do so by statute to meet to hear appeals.⁸ A mandamus lies to compel the holding of an election for officers of a school district or other corporation;⁹ to compel a register to register a deed, but not, when by reason of defects upon the face of the deed it is not entitled to be admitted to the record;¹⁰ to compel a jailer to give up the body of a prisoner dead within the jail, for burial;¹¹ to compel a railway company to complete its line.¹² It is no answer to an application for a mandamus to enforce the performance of a public duty, to show that the party claiming the writ has another remedy, unless it is also shown that the other remedy would be more suitable and effectual than the proceeding by man-

¹ 17 Q. B., 645.

² 2 Smith, 388.

³ 4 B. & Ad., 530.

⁴ 1 Law Bull., 81.

⁵ 75 N. Y., 38.

⁶ 2 Barb., 397.

⁷ 10 Abb. N. C., 122; 62 How., 220.

⁸ 18 Q. B., 155.

⁹ 52 N. H., 298.

¹⁰ 15 Q. B., 598; Id., 974.

¹¹ 1 G. & D., 566.

¹² 17 Q. B., 361.

damus.' Where there is another remedy equally convenient, beneficial and effectual, a mandamus will not be granted. "This is not a rule of law, but a rule regulating the discretion of the court in granting writs of mandamus."¹ If an action of debt is maintainable and affords an equally convenient, adequate and effectual remedy, the courts will leave the parties to their legal remedy;² but the fact that the defendant may be indicted is no answer;³ unless it is shown that an indictment will furnish a more adequate remedy than a mandamus;⁴ the mere fact that right of action for damages exists, will not exclude a mandamus where such remedy does not go to the specific relief sought.⁵ A party applying for a mandamus must make out a legal right and a legal obligation, and if he show such legal right it is sufficient, although there be also a remedy in equity, for when the court refuses to grant a mandamus because there is another specific remedy, they mean only a specific remedy at law. A legal obligation, which is the proper foundation for a mandamus, can only arise from the common law, from a statute or from contract. The fact that a person may have the specific relief sought for in equity, is no good ground for refusing a writ of mandamus. The application for the writ being addressed to the discretion of the court, it may consider all the *equities* as well as the facts, and should be guided by the legal rights and *equities* of the case;⁶ but if proceedings for the particular relief have been brought, and are pending in a court of equity, the party will generally be left to pursue his remedy there.⁷

¹ 2 B. & Ald., 809.

² Hill, J., 30 L. J., Q. B., 271.

³ 8 Ad. & El., Q. B., 70.

⁴ 2 Ad. & El., Q. B., 70.

⁵ 4 B. & C., 901; 3 R. T., 22.

⁶ 3 How. Pr., 78; 25 Barb., 27; Cooke (Tenn.), 160; 4 Kan., 250; 26 N. J., 99; 23 Vt., 478; 2 Gratt. (Va.), 575; 2 McCord (S. C.), 170; 12 La. Ann., 342; 11 Ind., 205.

⁷ 32 Md., 33; 53 Ill., 424.

⁸ Id.

Where the duty sought to be enforced is the payment of money and an action at law lies therefor, and affords as convenient and effectual a remedy as a writ of mandamus, the party will be left to his legal remedy, as the purpose of a mandamus is to afford relief when there is no other adequate remedy. It must appear that the relator has a clear legal right to the relief demanded against the person to whom he seeks to have the writ directed, and that it is the duty of such person to do the act, the doing of which the writ is sought to enforce.¹ Thus, where, by law, certain instruments are required to be recorded, and it is the duty of certain officers to record them, if such officer refuses to enter upon the record an instrument entitled to record, he will be compelled to discharge the duty by peremptory mandamus.² So where it is the duty of a board of canvassers to canvass the votes cast for a certain officer at an election, and give a certificate to the person receiving the largest vote—as for senator—the board will be compelled, by peremptory mandamus, to give their certificate to such person, irrespective of the question of his right, otherwise, thereto. They are not to pass upon questions of fraud or other irregularities, but simply to canvass the votes and give their certificate to the one to whom by law they are required to give it. Their duties are purely ministerial, and being plain, simple and unquestionable, they will be compelled to perform them.³ Where the functions of a canvassing board are merely ministerial, they may be compelled by mandamus to canvass the returns by mere computation, and to give certificates to the persons having the largest number of votes, leaving all judicial questions to be determined by the courts. *But where they are invested with judicial functions, they may exercise them to the*

¹ 42 Barb., 217; 11 Ind., 205; 12 Barb., 217; 25 Id., 73; 4 Ark., 802; 48 Ala., 170.

² 14 Johns., 325; Kirby (Conn.), 345.

³ 2 Minn., 180; 29 Ill., 413.

*extent given by law.*¹ This may not be done when they have already certified to the governor that the election is null and void, and they cannot then be compelled to return as elected those receiving the largest number of votes.² So, where a judgment is obtained against a municipal corporation, and there is no other method to enforce its payment, a mandamus lies to compel its payment.³ So, to compel the payment of land damages for lank taken for a street or highway;⁴ and so in *all* cases where the duty of the person, officer, board or corporation against whom the writ is sought, and the right of the person seeking it is clear, and there is no other *adequate specific* remedy, the remedy by mandamus exists.⁵

The mere fact that the party has another remedy is not of itself sufficient to warrant a denial of the writ. There must be some other equally *adequate specific* legal remedy, which will place the party in the situation to which his rights entitle him, and in which it is the duty of the officer, board, or corporation, or person against whom the writ is sought, to place him.⁶ Thus, the fact that a person who has a right to have an instrument recorded has a remedy against the officer whose duty it is to record it, for refusing to record it, in damages, does not deprive him of his remedy by mandamus, for the remedy by action is not the *specific* relief to which he is entitled; nor does it even tend to place him in the situation in which by law he is entitled to stand. The failure to record may defeat his title to property, and the remedy in damages is not *adequate* within the meaning of the term. But where a party holding a judgment against a municipal corpora-

¹ 7 Iowa, 186; Id., 390; Florida Sup. Ct. Dec., 1876.

² 3 Brev. (S. C.), 491; Id., 264.

³ 50 Ill., 453.

⁴ 29 N. J., 388.

⁵ 7 Cal., 276.

⁶ 7 Port. (Ala.), 37; 1 Pike (Ark.), 11; 2 Ired., 430; Dudley (Ga.), 37; 30 How. Pr., 78.

tion is entitled to an execution, and there is an ample remedy for the collection of the money due thereon by levy upon municipal property, *then mandamus* will not lie, for the party has an adequate remedy for the specific relief to which he is entitled, to wit, the liquidation of his judgment; and thus in *all* cases where there is no adequate legal remedy by action, equivalent to a *specific* remedy, and the right on the one hand and the duty on the other is clear;¹ and the writ will be effectual to secure the right;² and the amount of interest involved is not insignificant;³ and the act sought to be enforced is not unlawful;⁴ or discretionary;⁵ and there is no sufficient excuse for a refusal to do the act;⁶ a mandamus will generally be granted; but it must be remembered that the writ is not purely a matter of right, but, like the granting of an injunction, rests in the sound discretion of the court, in view of all the facts set forth in the petition, affidavits, or proved upon the hearing.⁷

The writ of mandamus lies against all ministerial officers, to compel them to execute the duties of their several offices, and discharge the functions delegated to them for the public benefit, although there be a penalty for their neglect.⁸ It will go to a jailor to compel him to give up the body of a deceased prisoner for debt to his executors,⁹ or to receive a prisoner;¹⁰ to the trustees of a public charity, whose duty it is to furnish a church warden with the keys of a chest, enjoining them to deliver the keys;¹¹ to justices and clerks of the peace of a borough, to permit a rate-payer to inspect and take copies of

¹ Cr. C. C. (U. S.), 7; 27 Mo., 225.

² 40 Me., 404; 29 Barb., 96; 29 Tenn. St., 121.

³ 27 Vt., 297.

⁴ 11 Humph. (Tenn.), 301.

⁵ 11 Pick. (Mass.), 189; 1 Yeates (Penn.), 46.

⁶ 32 Barb., 612.

⁷ 29 Me., 151; 22 Barb., 114; 48 Ala., 160; 4 Ark., 302; 40 Me., 304.

⁸ Comyn's Dig., MANDAMUS.

⁹ 2 Ad. & El. (Q. B.), 246.

¹⁰ 34 L. J. M. C., 137.

¹¹ 4 Ad. & El. (Q. B.), 161.

a rate;¹ also to a corporation, commanding them to permit a member of the body corporate to inspect the minute books, by-laws, and records of the corporation, for the purpose of determining a matter in controversy between the corporation and the individual member, respecting the rights and privileges of the latter under the charter.² But the court will not by mandamus compel the justices and the clerk of the peace of a county to allow rate-payers an inspection of the accounts and bills of charges of county officers settled and ordered to be paid at the sessions and deposited by the clerk of the peace amongst the county records, the rate-payers having no right to examine such accounts;³ nor will the court interfere by mandamus with the administration of the funds of charities;⁴ nor compel trustees of turnpike roads to repair and keep in repair a turnpike road;⁵ nor will a mandamus lie to the king's officer to compel him to deliver up property which he holds in his hands on behalf of the government, for a mandamus to the officer in such a case would be like a mandamus to the government, which the court cannot grant.⁶ The court will by mandamus compel the performance of a public duty by public officers, although the time prescribed by the statute for the performance of the duty has passed;⁷ and if the public officer to whom the performance of the duty belongs has in the meantime quitted his office, and been succeeded by another, it is the duty of the successor to obey the writ, and to do the acts, when required, which his predecessor has omitted to perform.⁸ In certain cases, however, where a public officer, occupying a subordinate position, has received an order from his supe-

¹ 4 B. & C., 891.

² 31 L. J., Q. B., 62; 12 Wend., 163.

³ 6 Ad. & El., 84.

⁴ 9 D. & R., 214.

⁵ 12 Ad. & El., 427.

⁶ 5 Id., 380.

⁷ 27 L. J., Q. B., 436.

⁸ 3 Md., 452; Kirby (Conn.), 345; 45 Barb., 454.

riors, or any competent authority, and is liable to an indictment for disobeying the order, the court has refused to proceed by mandamus and has left the parties to the ordinary remedies.¹ The party who is entitled to a mandamus to a public board, to compel the making of a certificate or assessment for the payment of a debt, should apply to the court within a reasonable time after default made. And if there is a *prima facie* case of laches or delay, the *onus* is thrown on the applicant of showing that he has not been guilty of such negligence as disentitles him to his remedy.² Where parties have acquiesced a year in the proceedings sought to be set aside, the writ will be denied in the absence of a sufficient reason for delay;³ four years.⁴

State officers may be compelled by mandamus to perform an official duty involving the exercise of no discretion.⁵ Thus, the State auditor may be compelled to audit a claim, or to issue his warrant when required by statute upon a claim duly audited.⁶ So, a State treasurer may be compelled to pay an order legally and properly drawn upon him.⁷ A secretary of State may be compelled to give a commission to a person who is entitled thereto;⁸ to furnish a copy of the laws;⁹ to add the appropriate date and perform every other necessary act connected with the filing and recording of an instrument in his office;¹⁰ to compel the attorney-general to issue a certificate that a suit was properly instituted when such certificate is necessary, in order to collect costs against the State; to compel the governor to sign a

¹ 6 Ad. & El., 401.

² 12 Q. B., 448.

³ 2 Wend., 264.

⁴ 43 N. H., 503; 1 Johns. Cas., 241; 12 Barb., 446; 2 Wend., 256; 16 Johns., 59.

⁵ 15 Iowa, 538.

⁶ 3 Bush (Ky.), 231; 40 Miss., 468.

⁷ 15 Wis., 75.

⁸ 1 Cr. (U. S.), 137; 17 La. Ann., 156

⁹ 4 Kan., 379.

¹⁰ 53 Penn. St., 9.

commission when the party is legally entitled to it;¹ to sign a patent for lands legally sold by the State;² or to do any merely ministerial duty;³ since overruled in *Rice v. Austin*.⁴ In several of the States it is held that the governor cannot be compelled by mandamus to do even a *ministerial* act.⁵ He cannot be compelled by mandamus to return a bill sent to him properly certified by the two houses, for his consideration;⁶ nor to issue a certificate so long as anything remains to be done to entitle the party thereto;⁷ and the tendency of the courts is against the existence of the right to interfere in *any* respect with executive action, and the right of authority is against the exercise of any such power. In *People v. Governor*,⁸ which was an application for a mandamus to compel the governor of Michigan to issue his certificate, showing that the Portage Lake and Lake Superior ship canal and harbor had been constructed according to an act of Congress, making a land grant for the same, and of acts of the legislature of the State conferring the grant upon a corporation which the relator represented, the court denied the writ upon the broad grounds that the court had no power to require the governor to do any act. "When," said COOLEY, J., "duties are imposed upon the governor, *whatever be their grade, importance or nature*, we doubt the right of the courts to say that this or that duty might properly have been imposed upon a secretary of State, or a sheriff of a county, or other inferior officer,¹ and that inasmuch if it had been so imposed, there would have been a judicial remedy for neglect to perform it; therefore, there must be a like

¹ 25 Md., 173.

² 4 Nev., 241.

³ 39 Cal., 189; 36 Ala., 371; 30 Cal., 596; 7 Jones (N. C.), 545; 5 Ohio St., 528; 23 Mo., 353; 7 Ga., 473; 4 Minn., 309.

⁴ 19 Minn., 103.

⁵ 8 Ga., 360; 1 Ark., 570; 2 Bailey (S. C.), 220

⁶ 40 Ill., 126.

⁷ 14 Iowa, 162.

⁸ 29 Mich., 320; 18 Am. Rep., 89.

remedy when the governor himself is guilty of a similar neglect. The apportionment of power, authority and duty to the governor is either made by the people in the Constitution, or by the legislature in making laws under it; and the courts, when the apportionment has been made, would be presumptuous if they should assume to declare that a particular duty assigned to the governor is not essentially executive, but is of such inferior grade and importance as properly to pertain to some inferior office, and consequently for the purposes of their jurisdiction, the courts may treat it precisely as if an inferior officer had been required to perform it. * * * Were the courts to go so far, they would break away from those checks and balances of government which were intended to be the checks of co-operation, and not of antagonism or mastery, and would concentrate in their own hands something at least of the power which the people, either directly or by the action of their representatives, decided to intrust to the other departments of the government.”¹ The duties of a governor are *executive* duties, and the courts cannot interfere with them. SHIPLEY, J., said: “It does not follow that an act cannot be the official act of a department of the government, *because other persons might lawfully have performed the same act*, if performance had by law been intrusted to them. * * * *When the performance is by law intrusted to an executive department of the government eo nomine, the performance of the duty is an official act.*” “The judicial and executive departments are made distinct and independent,” says BERRY, J., “and as neither is made responsible to the other for the performance of its duties, so neither can enforce the performance of the duties of the other.” The attempt on the part of some of the courts to interfere with the discharge of executive duties is not only in opposition to our theory of govern-

¹ 1 Ark., 570; 8 R. I., 192; 25 N. J., 331; 33 Me., 510; 19 Ill., 229; 12 Am. Rep., 712; 13 Id., 126; 19 Minn., 103; 18 Am. Rep., 330; 24 Tex., 317.

ment and in excess of their power, but also attended with great danger. If the courts may interfere with the discharge of *any* ministerial duties of the executive department of the government, they may with all, and we should have the singular spectacle of a government run by the courts instead of the officers provided by the Constitution. Each department of the government is essentially and necessarily distinct from the others, and neither can lawfully trench upon or interfere with the powers of the other; and our safety, both as to National and State governments is largely dependent upon the preservation of the distribution of power and authority made by the Constitution, and the laws made in pursuance thereof. If the governor refuses or neglects to discharge his duties, exceeds his powers in flagrant cases, there is ample remedy by impeachment and removal from office. It is not believed that the courts have the power to discharge his duties for him, or to say what he shall or what he shall not do. Whatever may be the *power* of a court, it will exercise it very cautiously when called upon to interfere with the action of the executive officers of the State, and the right of the party to the relief sought must not only be beyond doubt or question, but it must also appear that the officer has no discretionary power over the matter.¹ It lies to compel the secretary of the land office to discharge ministerial duties incident to his office required by law;² or to any head of a department to compel the performance of a plain ministerial duty;³ but *never* to do an act which involves the exercise of discretion, or where there was no authority for doing the act without the aid of the writ.⁴ A mandamus lies to compel the board of State canvassers to meet and canvass the votes of the State in a purely ministerial capacity when so required by statute, and the fact that they have previously met

¹ 3 Fla., 202; 5 Wall. (U. S.), 563; 17 How. (U. S.), 284; 17 Id., 225; 12 Pet. (U. S.), 524.

² 1 S. & R. (Penn.), 87.

³ 5 Tex., 471.

⁴ 4 Cal., 177.

and canvassed the votes in a judicial capacity, and issued their certificates of election, is not a bar to the remedy.¹ So, it lies to compel the board of canvassers to give a certificate of election to one who is legally entitled thereto, even though the certificate has been given to another, and such other person is actually in possession of the office, and the petitioner might be compelled to resort to a writ of *quo warranto* to remove him therefrom.² But *contra*, see *The People v. New York*,³ in which it was held that where another person is in the possession of an office before, a mandamus cannot issue to admit another person thereto, but that he must first be removed by *quo warranto*.⁴ In *Ellis v. County Comm'rs*,⁵ it was held, that a mandamus would lie to compel a board of canvassers to certify that the petitioner had a majority of votes cast for county treasurer, even though they had issued their certificate to another person. But *contra*, see *Grier v. Shackelford*.⁶

A justice of the peace may by mandamus be compelled to make a true record of a judgment rendered by him, and to furnish a copy to a party entitled thereto when demanded.⁷ So where a county clerk, or other officer having charge of a corporate seal, issues a document and neglects to attach his seal thereto, and goes out of office, his successor may be compelled to affix the seal; and in such case a demand is not necessary to create the duty, but only as a preliminary step to the enforcement of the remedy.⁸ So a clerk may be compelled to give copies of records, to permit an inspection of records, to make records, file papers, and generally to do any act required

¹ Sup. Ct. Fla. Dec., 1876.

² 20 Pick. (Mass.), 484; 4 Term. Rep., 699; 3 H. & M. (Va.), 1; 6 Dane's Abr., 335.

³ 3 Johns. Cas., 79.

⁴ 43 Mo., 256.

⁵ 2 Gray (Mass.), 370.

⁶ 3 Brev. (S. C.), 491; Id., 264.

⁷ 33 Conn., 103.

⁸ 34 Iowa, 175.

by law.¹ So a sheriff may by mandamus be compelled to perform any duty required of him by law.² Bonds, mortgages, or other securities deposited with a State treasurer under a law held unconstitutional, are in his official custody and he is responsible for their safe-keeping and return to the makers, when demanded, and upon his refusal to do so he may be compelled to deliver them by mandamus.³ A State treasurer cannot be required to make a distribution of funds, as required by statute, until the funds are in his hands.⁴ A mandamus will lie against a State auditor to issue a warrant for money due from the State under a contract, and to compel the State treasurer to countersign and deliver the warrant to the person entitled thereto, even though there are no moneys to pay the same in the treasury.⁵ Where a city council is required by law to collect a tax upon the real and personal property of the city sufficient in amount annually to pay off the interest upon bonds issued by the city in payment of a subscription of stock to a railroad company, and the council refuse to do so, and there is no specific legal remedy provided for non-performance, mandamus may be maintained to compel them to discharge that duty, at the instance of holders to whom the bonds have been passed by the company. An express refusal, in terms, is not necessary to put the defendants in fault; it will be sufficient that their conduct makes it apparent that they do not intend to do the act required. Any of the bondholders may apply for the writ, and it is not necessary that the others should be made parties. Nor is it necessary to make the railroad company to whom the bonds were executed, the taxpayers of the city, or the Commonwealth parties to the proceeding. That an action had been brought against the city upon the interest coupons, which was dismissed before judgment

¹ 3 Abb., 491.

² 2 Neb., 7.

³ 24 Mich., 468.

⁴ 24 La. Ann., 12.

⁵ 58 Ill., 90.

upon the mandamus, forms no obstacle to the granting of the writ.¹ But when the act under which the assessment is to be made is for any reason void or inoperative, mandamus will not lie to compel the doing of any act under it.² A mandamus requiring a municipal corporation to provide for the payment of the interest on its bonds need not set forth when the principal will become due, nor when nor where the interest is to be paid; nor is it necessary that the relator's title to the bonds should be set forth; the averment of his ownership is sufficient to show his right to ask the interference of the court by mandamus. The ownership of the bonds necessarily includes the ownership of the right to the interest secured by them and of the coupons attached, which are part of the securities. An averment that the defendants have refused to make any provisions for the payment of the interest is sufficient, without showing that a demand was made upon them to do so. The grant of the power to assess and collect taxes for the payment of the interest on the bonds imposes upon the defendants the duty of exercising such power. It is a sufficient averment of the want of other legal remedy, that the relator distinctly asserts that he cannot have adequate relief without the aid of a writ of mandamus. A mandamus to compel the assessment and collection of a tax for the payment of the interest on bonds issued by the city of Pittsburgh is properly directed to the individuals composing the select and common councils of the city. It is not sufficient, in the return, to aver that the bonds were not transferred in accordance with the acts of assembly; the defendants must show wherein the supposed illegality of the transfer consists. The grant of power to assess and collect a tax for a particular purpose is a repeal, *pro tanto*, of all prior statutory restrictions upon the exercise of the power of taxation. An averment, in the return, that the liability of the city upon the bonds is disputed,

¹ 2 Metc. (Ky.), 56.

² 86 N. Y., 224.

is not sufficient to prevent the issuing of a peremptory mandamus; the defendants must obey the writ, or show facts from which the court may determine that the debt is not due; or, at least, that it is doubtful whether it be due. The pendency of a suit upon other bonds than those of the relator is not material, in the absence of any averment of facts which, if true, would amount to a defense.¹ A proceeding commenced by a public officer in his official character does not abate either upon his death or removal from office, but is continued by his successor.² Where a duty arises from a public statute, it is sufficient to state the facts from which the duty arises, and in that event the petition will be good even though the statute is not referred to.³ A command to audit a claim is not a command to allow it.⁴

In all cases the peremptory writ must follow the rule absolute and the alternative writ, and if the peremptory writ commands the doing of acts beyond those required in the alternative writ and rule absolute, it will be quashed. It cannot be extended beyond the order granting it, and if it does it is wholly inoperative and void;⁵ neither should it embrace *any* matters that go beyond the legal obligation of the defendant, *as in that case* the whole writ not only *will* but *must* be set aside. If there is any *essential* variance between the alternative and peremptory writ, the later will be set aside. But when the variance is in *immaterial* matters, and in substance the two writs command the doing of the same act, and the variance does not impose any additional burdens upon the defendant, and relates to an act which the defendant by law is under obligation to do, the peremptory writ will not be set aside.⁶ Generally a relator, in order to entitle himself to a peremptory writ of mandamus,

¹ 84 Penn. St., 496.

² 2 Head (Tenn.), 650.

³ 7 Clark (Iowa), 686.

⁴ 11 Cal., 42.

⁵ 6 Ad. & El., 255; 16 Id., 19.

⁶ 58 N. Y., 153.

must clearly establish his right to have *all* the things done that are specified in the alternative writ. *But where the writ conforms to the legal obligation of the defendants and does not exceed them*, it will not be quashed, even though in some immaterial matters it varies from the alternative writ. "I think," said FOLGER, J., in the case last referred to, "that the rule to be drawn from the authorities is this: That, when the alternative writ, or the rule absolute, has been for the doing of something, to command which there was no power given by statute on which the proceedings were based, that there the question not being a variation in the detail, or of the exercise of the discretion of the court as to means, but of whether there was or not the power to command the doing of the *substantial* act, the court will not award a peremptory mandamus commanding the doing of *substantially* a different thing." "The peremptory writ must not," continued the learned judge, "materially enlarge the substantial terms of the rule absolute or of the alternative writ, nor exceed them beyond adding merely incidental matters," and he cites numerous English cases in support of his views.¹ The fact that the alternative writ requires the doing of the act in general terms, will not prevent the mandatory writ from going into particulars, and directing the doing of the act in a specific manner, if thereby the burden upon the defendant is not increased and his legal obligation is not exceeded.²

To entitle a person to a mandamus, enjoining the performance of some particular act or duty, it must be shown that there has been a distinct demand of that which the person moving for the writ desires to enforce;³ and a refusal or withholding of compliance on the part of the defendant;⁴ but the objection that no sufficient demand and refusal appear must be taken before the

¹ 6 Ad. & El., 355; 5 Id., 804.

² 45 N. Y., 196; 51 Id., 408; 58 Id., 152; 3 Ad. & El., 544; 2 Id., 64.

³ 4 Ad. & El. (Q. B.), 162.

⁴ 3 Ad. & El., 222.

merits are discussed.¹ As a general an applicant for a mandamus must show a demand;² but where the duty is imperatively imposed by law, as to levy a tax, a mere neglect to perform the duty is sufficient.³ When an application is made for a mandamus his interest as well as special reasons for the writ must appear, and, unless a right is disclosed, the writ must be denied.⁴ The writ should not command the defendant to do more than he is a legal obligation to perform, and if it does, it is invalid, and will be quashed. And where it orders several things to be done, and is bad in respect of one of the things commanded, it is bad *in toto*. If the petition asks for too much, it must be dismissed. That is, if it asks for more than the defendant is bound to do.⁵ A variance in the petition and alternative words is not fatal;⁶ but a variance in substance is fatal. If the defendant desires to object on the ground that it is not a corporation, the objection must be plead or it will be treated as waived.⁷ The writ may be issued by any court or judge who has power to issue an injunction.⁸ Unless the statute provides otherwise a mandamus against a public officer abates at his death, or removal from office.⁹ Allegations of conclusions of law, and equivocal pleading is insufficient. The return must set forth matters that show a legal or proper excuse or reason why the doing of the act should not be performed.¹⁰ The cause, after the return to an alternative mandamus, is to be heard on those papers, without referring to the affidavits on which the writ was granted. It may, by

¹ 10 Ad. & El., 531; 15 Ga., 473; 37 Barb., 466; 34 Penn. St., 277; 25 N. J., 331.

² 67 N. C., 330.

³ 13 Fla., 451; 17 Minn., 429; 7 Rich. (S. C.), 284.

⁴ 4 B. & Ad., 901.

⁵ 2 Hun, 224; 58 N. Y., 295.

⁶ 47 How. Pr., 270.

⁷ 3 Hun, 361.

⁸ 1 Barb., 425.

⁹ 17 Wall. (U. S.), 604.

¹⁰ 56 N. Y., 249.

consent, be heard without demurrer or traverse.' All issues of fact, after an alternative writ is granted, must be tried by jury.' A mandamus must be issued only against the officer, department or body having authority to do the act. Thus, if a municipal corporation is required by law to do a particular act, the mandamus must be directed to the organ of the corporation that is required to perform it: as if the passage of an ordinance is required, to the common council.' It should be directed to those, and those only, who are to obey the writ. Therefore, "if the writ be directed to two persons where it ought to be to one only, it is naught." ¹ And so it is if it be directed to a corporation in a wrong name; ² but it may be directed either to the corporation in its corporate name, or to those who by the constitution of the corporation ought to do the act.' A mandamus to compel the admission to customary or copyhold estates must be directed to the lord and steward jointly, and not to the steward alone, in order that the interests of the lord may be effectually protected.' It is at the peril of the person who desires the writ to have it properly directed.' A mandamus cannot issue to compel a public officer to perform duties not imposed upon him by law. Thus, a mandamus directing the comptroller of New York city to procure the signature of the mayor, and the corporate seal to be attached to bonds, is erroneous and inoperative. It should be restricted in its command, simply to those acts which lie in his department, and one personal to himself, to wit: the preparation of the bonds, and the affixing of his own signature.' The prayer in a petition

¹ 56 N. Y., 249.

² 5 T. & C., 376.

³ 8 Keyes, 81.

⁴ 2 Salk., 701.

⁵ 2 Salk., 433.

⁶ 1 Ld. Raym., 559.

⁷ 1 Ad. & El. (Q. B.), 366.

⁸ 2 Burr., 782.

⁹ 39 Barb., 522.

may be entirely disregarded, and the final order made to conform to the facts alleged and established.¹ The fact that the statute providing that where issue is taken upon a return to a writ of alternative mandamus in case a verdict shall be found for the relator, he shall recover his damages and costs in like manner as in an action, and that a peremptory writ of mandamus shall issue without delay, does not apply where the record shows that he has no legal right thereto. And an objection to the relators right to the relief may be made at any time after a return and before a peremptory writ is granted, or he may show any defect of substance, but after return he cannot object to matters of form.² If necessary facts are omitted in the writ, the defect cannot be cured by the return.³ No amendment is allowed to cure a defect in an alternative mandamus after the return day;⁴ but see *State v. Gibbs*,⁵ where it was held than an *alternative* mandamus may be amended, and *Columbia Co. v. King*,⁶ where it was held that a *peremptory* mandamus cannot be amended. In *State v. Alderman*,⁷ it was held than an alternative mandamus might be amended where the peremptory writ could not issue in the exact terms of the alternative by striking out immaterial matter. In all cases the proceedings on their face should show a clear right to the relief demanded, and set forth all the *material* facts, so that they may be admitted or traversed.⁸ Thus, a petition for a mandamus to county commissioners to compel them to declare a person a commissioner of deeds should aver *affirmatively* that a vacancy existed when the alleged election took place.⁹ In order to warrant the issue

¹ 23 Mo., 156.

² 53 N. Y., 128.

³ 4 H. L. Cas., 471.

⁴ 5 Abb. Pr., N. S., 241.

⁵ 13 Fla., 55.

⁶ 13 Fla., 451.

⁷ 1 Sc., 80.

⁸ 10 Wis., 518; 11 Id., 17; 12 Ill., 248; 33 Id., 9.

⁹ 50 Me., 248.

of a mandamus, the petition should not only aver that the defendant has omitted a manifest duty, and contain all necessary affirmative allegations, but should also contain an averment that other facts, which would constitute an excuse, do not exist.¹ But though the statement is defective, if the claim is valid, and is sustained by the evidence, and the facts so appearing would support the claim to the writ, the defect is cured by the verdict.² The writ may be questioned by showing that the title set out does not warrant the mandatory part of the writ. Thus, if there is any discretion to be exercised as to the time when a thing is to be done, or if the time or mode of performance is conditional, or dependent upon a contingency, a writ commanding the doing of the thing at once, without giving any discretion, or providing for the contingency, will be defective.³ So, where an act of parliament directs one or other of two things to be done, the party who is to do the act has the option of doing which thing he pleases. A writ of mandamus, therefore, founded on the statute, and failing to give the election, is invalid, unless it assigns some sufficient reason why the party is no longer to have his election.⁴ The writ may be general in its terms, showing what ought to be done by the defendants, and what is required to be done by them, *but the return to the writ must be particular and minute.*⁵ A writ of mandamus to a corporation or chartered company, to compel the payment of a sum of money, should show on the face of it that the remedy by way of action or distress, for the recovery of the money, is not available.⁶

A mandamus cannot be issued, even when the parties consent thereto, to compel the doing of those things to

¹ 25 Me., 333; 4 Nev., 400; 14 Mich. 28; 10 Wend. 25.

² H. L. Cas., 419.

³ 31 L. J. Q. B., 50.

⁴ 4 H. L. Cas., 471.

⁵ 1 B. & S., 5.

⁶ 3 B. & Ald., 24.

which by law, the writ does not extend, as to compel the payment of a claim by the Lord of the treasury.¹ When the mandatory part of a mandamus goes beyond the legal duty of the defendant, it is bad altogether.² In *Reg. v. Lichfield*,³ the order embraced a period during which the yearly sum required by the order to be paid did not apply, and it was held that, for this reason, the order was bad, and a nullity. A mandamus may be in the alternative and require the defendant to do one of several things, if the duty is one enjoined by statute, and there has been a general refusal to comply with such requisition.⁴

The answer of the defendant may be traversed, and the court has power to hear evidence for and against its statements and determine all questions of law.⁵ A mandamus against a city council is virtually a proceeding against the corporation, and the judgment is obligatory on the members in office at the time of its rendition, and a change of membership does not change the proceedings so as to abate the writ. The constituent parts of the board may not be the same, *but* the representative body remains the same. The proceedings only assume a personal or individual character when attachment for contempt is necessary to enforce the order.⁶ If a party seeking a remedy by mandamus elects to rest his case upon the affidavits, the answering affidavits, that are neither traversed, nor confessed, nor avoided, will be taken as true. If he desires to controvert or avoid them, he should take an alternative writ, so that, upon answer and return, the questions of fact can be tried.⁷ Where a necessary fact is omitted in the writ,

¹ 16 Q. B., 357.

² 3 Ad. & El., 535; 16 Q. B., 191.

³ 16 Id., 781.

⁴ 8 Ad. & El., 889.

⁵ 2 Metc. (Ky.), 56.

⁶ Id.

⁷ 55 N. Y., 198.

the defect cannot be cured by the return.¹ The mandatory part of a writ may be very general, but the return must be very minute in showing why the party did not do the act commanded.² The return may show any number of causes why the writ is not obeyed, if the causes assigned are consistent;³ but if they are inconsistent, the whole return is bad.⁴ When the right of the relator to relief prayed for is doubtful, it furnishes a good excuse to the defendant for not doing the act sought to be enforced. Thus, when the relator was removed from the office of clerk of the District Court by the justice thereof, wrongfully, as he claimed, and another was appointed in his place, and discharged the duties of the office under color of law, and the language of the statute was so ambiguous as to be difficult of interpretation, it was that the title to the office should not be determined in proceedings for a mandamus, and consequently that the justice could not thereby be compelled to give the relator a certificate for the payment of his salary during the period that the person appointed in his place had filled the office and discharged its duties;⁵ and the court also intimated that the *title* to an office should *never* be tried collaterally on proceedings for a mandamus.⁶

Prohibition.

The writ of prohibition is issued to prohibit a court and party to whom it is directed, from proceeding in a suit or matter depending before such court, upon the suggestion that the cognizance of such suit or matter does not belong to it. The office of a prohibition is to prevent courts from going beyond their jurisdiction in the exercise of judicial and not ministerial power, and should not

¹ 4 H. L. Cas., 471.

² 1 B. & S., 5.

³ 4 Burr., 2041.

⁴ 4 Burr., 2098.

⁵ 55 N. Y., 27.

⁶ 5 Hill, 216; 12 Hill, 367; 1 Id., 201.

be issued where there are other perfectly adequate remedies. It is a preventive, not a corrective remedy.¹

Kinds of writ—How granted.

A writ of prohibition is either alternative or absolute. The alternative writ may be granted upon an affidavit, or other written proof, showing a proper case therefor, and either with or without previous notice of the application, as the court thinks proper.²

The writ can be issued only by the Supreme and Superior Courts.³ It is granted or denied on the discretion of the court.⁴

The writ of prohibition does not lie to a ministerial officer, to stay the execution of process in his hands,⁵ nor does it lie to prohibit the exercise of ministerial power on the part of a judicial officer.⁶ Thus, it does not lie to prohibit the issuing of an execution, which is a ministerial power.⁷

Where the court has erred in the decision of a matter within its jurisdiction, the remedy is by appeal, error, or *certiorari*, as the case may be; and not by prohibition.

Where granted.

Except where special provision therefor is otherwise made in this article, an alternative writ of prohibition can be granted only at a special term of the court. In the Supreme Court, the special term must be one held within the judicial district embracing the county wherein the action is triable, or the special proceeding is brought, in the course of which the matter sought to be prohibited by the writ originated.⁸

¹ 61 How., 514; 19 Wend., 154.

² Code Civ. Pro., § 2091.

³ 46 How., 7.

⁴ 43 Barb., 298; 17 Abb., 438; 28 How., 477; 19 Id., 136; 51 Barb., 312; 42 How., 157.

⁵ 1 Hill, 195; 7 Wend., 436.

⁶ 60 N. Y., 31.

⁷ 2 Hill, 367.

⁸ Code Civ. Pro., § 2092.

An alternative writ of prohibition may be granted at a general term of the Supreme Court only, directed generally to any judge holding, or to hold, a special term of the same court, or directed to one or more judges of the same court, named therein, in any case where such a writ may be issued out of the Supreme Court, directed to any other court, or to a judge thereof. Such a writ can be granted only at the general term of the judicial department, embracing the county wherein the action is triable, or the special proceeding is brought, in the course of which the matter sought to be prohibited by the writ originated, unless that general term is not in session; in which case it may be granted at the general term of an adjoining judicial department.¹

To whom directed — Its contents — Alternative writ must issue first.

The writ, when issued, is directed to the court and party, commanding that they desist and refrain from any further proceedings in the suit or matter specified therein, until the next term of the said court, and the further order of the said Supreme Court thereon, and that they then show cause why they should not be absolutely restrained from any further proceedings in such suit or matter. When served, it stays both the court and the party from proceeding in the matter or suit.

Except as otherwise specially prescribed by law, an absolute writ of prohibition cannot be issued until an alternative writ has been issued and duly served, and the return day thereof has elapsed. The alternative writ must be directed to the court in which, or to the judge before whom, and also to the party in whose favor, the proceedings to be restrained were taken, or are about to be taken. It must command the court or judge, and also the party, to desist and refrain from any further proceedings in the action or special proceeding, or with respect to the particular matter or thing described there-

¹ 5 Code Civ. Pro., § 2093.

in, as the case may be, until the further direction of the court issuing the writ; and also to show cause, at the time when, and the place where, the writ is made returnable, why they should not be absolutely restrained from any further proceedings in that action, special proceeding or matter. The writ need not contain any statement of the facts or legal objections upon which the relator founds his claim to relief.¹

When writ returnable — How served.

The writ must be made returnable, either forthwith or at a day certain, before the term which granted it, or upon the first day of a future term, therein specified, at which application for the writ might have been made. Where it is granted at the general term of a judicial department, adjoining that wherein the matter originated, it may, in the discretion of the court, be made returnable at the general term of either department. The writ must be served upon the court or judge, and also upon the party, as prescribed by law for the service of an alternative writ of mandamus. A copy of the papers, upon which it was granted, must be delivered with each copy of the writ.²

Absolute writ issues, unless return made.

Where the alternative writ has been duly served upon the court or judge, and upon the party, the relator is entitled to an absolute writ, unless a return is made by the court or judge, and by the party, according to the exigency of the alternative writ, or within such further time as may be granted for the purpose. The return must be annexed to a copy of the writ; and it must be either delivered in open court, or filed in the office of the clerk of the court issuing the writ; or, in the supreme court, the clerk of the county where the writ is returnable. Where the party makes a return, the court or judge must also make a return. In default thereof, the judge

¹ Code Civ. Pro., § 2094.

² Code Civ. Pro., § 2095.

or the members of the court, may be punished, upon the application of the people or of the relator, for a contempt of the court issuing the writ. A return to an alternative writ of prohibition cannot be compelled in any other case.¹

Motion to quash or set aside the writ.

An alternative writ of prohibition cannot be quashed or set aside, upon motion, for any matter involving the merits. An objection to the legal sufficiency of the papers, upon which the writ was granted, may be taken in the return. A motion to quash an absolute writ of prohibition, or to set aside an alternative writ, for any matter not involving the merits, must be made at a term where the writ might have been granted.²

How stayed.

The proceedings upon a writ of prohibition, granted at a special term, may be stayed, and the time for making a return, or for doing any other act thereupon, as prescribed in this article, may be enlarged, as in an action, by an order made by the judge of the court, but not by any other officer. Where the writ was granted at the general term, an order staying the proceedings, or enlarging the time to make a return, can be made only by a general term justice of the judicial department within which the writ is returnable; and where notice has been given of an application for a prohibition at a general term, or an order has been made to show cause at a general term, why a prohibition should not issue, a stay of proceedings shall not be granted, before the hearing, by any court or judge.³

The return of the writ.

A return to an alternative writ, when made by a party, must be verified by his affidavit, as required for the veri-

¹ Code Civ. Pro., § 2096; 5 Hun, 29.

² Code Civ. Pro., § 2097; 19 Abb. 136.

³ Code Civ. Pro., § 2103.

fication of a pleading in a court of record; unless it consists only of objections to the legal sufficiency of the papers upon which the writ was granted. Where the party unites with the court or judge in a return, or annexes, to the court's or the judge's return, an instrument in writing, subscribed by him, to the effect that he adopts it, and relies upon the matters therein contained, as sufficient cause why the court or judge should not be restrained, as mentioned in the writ, he is thenceforth deemed the sole defendant in the special proceeding; except that where a final order is made awarding an absolute writ of prohibition, such a writ must be directed to the party, and also to the court or the judge.¹

Proceedings after return.

Pleadings are not allowed upon a writ of prohibition. Where an alternative writ has been issued, the cause may be disposed of without further notice, at the term at which the writ is returnable. If it is not then disposed of, it may be brought to a hearing, upon notice, at a subsequent term. In the Supreme Court, it must be heard at a general term of the same judicial department, or at a special term held in the same judicial district, as the case may be. The relator may controvert, by affidavit, any allegation of new matter contained in the return. The court may direct the trial of any question of fact by a jury, in like manner and with like effect, as where an order is made for the trial, by a jury, of issues of fact, joined in an action triable by the court. Where such a direction is given, the proceedings must be the same as upon the trial of issues so joined in an action.²

Final order—Costs.

Where a final order is made in favor of the relator, it must award an absolute writ of prohibition; and it may also direct that all proceedings, or any specified proceed-

¹ Code Civ. Pro., § 2098.

² Code Civ. Pro., § 2099.

ing, theretofore taken in the action, special proceeding, or matter, as to which the prohibition absolute issues, be vacated and annulled. The writ of consultation is abolished. Where a final order is made against the relator, it must authorize the court or judge, and the adverse party, to proceed in the action, special proceeding, or matter, as if the alternative writ had not been issued. Costs, not exceeding fifty dollars and disbursements, may be awarded to either party, as upon a motion.¹

Appeals.

A final order, made as prescribed in the last section, can be reviewed only by appeal. Where the order was made by the general term, the execution of the order appealed from shall not be stayed, except by an order of the same general term, made upon such terms, as to security or otherwise, as justice requires.²

Prohibition.

A writ of prohibition lies only to restrain *a judicial act*. If the act sought to be restrained is purely ministerial, it will not lie;³ *but all acts, based upon a decision, judicial in its nature, and affecting either a public or private right, are judicial acts.*⁴ It is a proper remedy when a judge or court attempts to proceed in execution of a judgment after an appeal is taken.⁵ It lies in some cases to restrain the proceedings of courts of criminal jurisdiction, or to prevent a coroner holding an inquest, from extending his inquiries beyond the proper limits of his jurisdiction. The writ does not lie to restrain the institution of a threatened suit, but only one already commenced, nor to restrain any threatened judicial act un-

¹ Code Civ. Pro., § 2100; 1 Civ. Pro. R., 244; 61 How., 514.

² Code Civ. Pro., § 2101; 89 N. Y., 152.

³ 39 L. J. Q. B., 249; 42 Mo., 133; 13 Minn., 244; 1 Hill, 195; 2 Ired. (N. C.), 183.

⁴ 8 Q. B., 75; 12 Id., 960; 14 Id., 854.

⁵ 21 La. Ann., 113; Id., 123.

less a part of the proceedings of an action already instituted; but if the act is judicial, and can be performed without the existence of an action, it is otherwise. Hence, if the act will be illegal and in excess of the lawful jurisdiction of the person or body upon whom its execution rests, a writ of prohibition may issue to restrain the doing of it at all. Thus, it lies where an act of the legislature, which was unconstitutional, provided for the appointment of commissioners to carry into effect an act authorizing a town to borrow money and *donate* it to a railroad company, which act required him to appoint such commissioners under his hand and seal, upon application to three freeholders of the town, it was held that this was a judicial act, to restrain which a writ of prohibition was the proper remedy.¹ It will be refused where general scope or purpose of action is within the jurisdiction of inferior court;² it will not be issued to restrain an act which can be disposed of on an appeal, or other method of review;³ it is a remedy to restrain an inferior tribunal from doing an illegal act beyond its jurisdiction, where there is no remedy by *certiorari* or other adequate proceeding;⁴ it lies to settle the jurisdiction of surrogates of two counties depending on residence,⁵ to restrain the removal of a city officer by the mayor, where his power to remove does not exist,⁶ issued to prevent a court from trying a case between sailors and officers of foreign vessels, where a treaty stipulated that courts should have no jurisdiction;⁷ it lies to restrain an *unauthorized*, act even where the court has jurisdiction,⁸ but not where their proceedings are merely erroneous,⁹ or are subject to

¹ 51 Barb., 312.

² 10 N. Y. St. Rep., 723.

³ 11 Mich., 393.

⁴ 7 Wend., 418; 27 How. Pr., 14; 49 Barb., 351; 36 Id., 341; 3 Dallas (U. S.), 121.

⁵ 53 How., 221.

⁶ 57 How., 416.

⁷ 6 Hun, 214.

⁸ 20 N. Y., 531; 51 Barb., 312.

⁹ 2 Hill, 363.

review by *certiorari*¹ or other adequate remedies;² nor does it lie to a merely *ministerial* officer.³ It only lies to *prevent* the doing of an act, and can *never* be used as a remedy for acts already done.⁴ It will not lie to restrain executive or administrative officers;⁵ nor merely ministerial acts of a judicial tribunal;⁶ nor to arrest the proceedings of a board of supervisors, unless they are acting in excess of their powers; or in proceedings judicial in their nature;⁷ nor to restrain proceedings in a cause over which the court has jurisdiction.⁸

The writ cannot be issued to prohibit those who are *de facto* in possession of a public office from exercising its functions during the pendency of proceedings to determine his title thereto.⁹ It can only operate upon a pending suit, and cannot be used to prevent the institution of an action.¹⁰ It should issue to an officer proceeding under an unconstitutional statute.¹¹ It will lie to prevent threatened punishment of sheriff for contempt in disobeying order of justices of city court to furnish them with rooms.¹² It cannot be issued to prevent an act which the court has legal power to exercise.¹³ Its office is to restrain an inferior tribunal from taking cognizance of a matter beyond its jurisdiction; and it is to this question, upon an application for the writ, that the court will direct its attention. The fact as to whether the court acted *rightly* or not is not open to inquiry. If it has jurisdiction, the writ cannot issue, however wrong or erro-

¹ 45 How. Pr., 157.

² 31 How. Pr., 237; 21 Hun, 591; 51 How., 269; 79 N. Y., 582.

³ 1 Hill, 195; 41 Mo., 44.

⁴ 4 Wall. (U. S.), 158.

⁵ 33 Wis., 93.

⁶ 46 How. Pr., 7.

⁷ 47 Cal., 81; 63 How., 411.

⁸ 2 Metc. (Mass.), 296; 5 Dana (Ky.), 18.

⁹ 2 Ired., 183.

¹⁰ Dudley (Ga.), 221.

¹¹ 51 Barb., 312.

¹² 16 N. Y. St. Rep., 537.

¹³ 5 Pike (Ark.), 21.

neous the action of the court may be.¹ When, in summary proceedings, a justice has jurisdiction of the persons, and the case and the subject-matter, prohibition is improper, it will lie where, although there is jurisdiction in summary proceedings in general, there is none upon the facts set out in the applicant's affidavit.² It lies to a court of criminal as well as civil jurisdiction;³ and it can only operate to prevent a court or judicial body from *proceeding*, and not from exercising its lawful jurisdiction;⁴ and it will not be issued where the question of jurisdiction is doubtful and the remedy would result in public inconvenience;⁵ nor to correct mere errors or irregularities;⁶ but it will lie when the court, although having jurisdiction, proceeds to do an unlawful and unauthorized act.⁷ And before the writ will lie, a plea to the jurisdiction must first be interposed and overruled;⁸ and the party must be given an opportunity to show cause why it should not issue.⁹ When it appears that the case is no longer pending the writ will not be granted, although the final disposition of it was made after the service of the rule to show cause why the writ should not issue;¹⁰ nor where there is another or adequate remedy, as by appeal, *certiorari*, etc.¹¹

It does not lie to an inferior court to restrain the issue of an execution, for it is a ministerial act.¹² If the court had jurisdiction over a cause, the mere fact that it has exceeded its authority in a portion of its judgment will

¹ 7 S. & M. (Miss.), 623; 49 Barb., 351; 16 C. B. (N. S.), 396.

² 84 N. Y., 287; 2 Civ. Pro. R., 52.

³ 3 El. & Bl., 113.

⁴ 43 Barb., 278; 36 Id., 341; 19 Abb. Pr., 136; 27 How. Pr., 14.

⁵ 31 How. Pr., 237.

⁶ 36 Barb., 341.

⁷ 20 N. Y., 531.

⁸ 26 Ark., 53.

⁹ 25 Ark., 567.

¹⁰ 4 Wall. (U. S.), 158; 1 Black (U. S.), 503.

¹¹ 2 Nev., 75; 11 Wis., 50; 14 Ind., 235.

¹² 2 Hill, 367.

not warrant the issue of a writ of prohibition.¹ When the court usurps jurisdiction, this is not only the *proper*, but it is the *only remedy*.² Prohibition cannot properly be issued to restrain the board of police justices of New York, in appointing and removing clerks of courts, since in discharging that duty they do not act as a court.³ It is not within the office of the writ to correct irregularities in judicial proceedings.⁴

In order to authorize the issue of the writ the petition should clearly show that the inferior court is about to proceed in a matter over which it has no jurisdiction, and this may be done by setting forth any acts or declarations of the court or officer indicative of such purposes;⁵ and the mere fact that the opposing counsel has noticed a motion for a hearing before a court commissioner, which such commissioner has no authority to entertain, is not enough, unless it is also shown that he *intends* to entertain it. Nor can a writ of prohibition be issued in such form as will entitle the parties to join an issue before a jury.⁶ A variance between the suggestion and the declaration is not fatal in bar, and, therefore, is not a good ground of demurrer.⁷ But the affidavit (or suggestion) to a petition must set forth either that the affiant has knowledge or information concerning the matter stated in the petition, and if there is nothing before the court but the petition and answer thereto, the petition will be dismissed if the answer denies the allegations of the petition. The petitioner in such case should traverse the answer.⁸ If the writ is issued and disobeyed, the remedy is by attachment for contempt, as in the case of

¹ 43 Barb., 278.

² 16 La. Ann., 185; Chitty's Pr., 1725.

³ 46 How., 7.

⁴ 19 Abb., 136.

⁵ 4 Minn., 369; 14 La. Ann., 504.

⁶ Id.; 14 La. Ann., 504.

⁷ 15 Gratt. (Va.), 528.

⁸ 30 Cal., 244.

a violation of an ordinary injunction order.¹ A writ of prohibition is a proper proceeding by which to arrest the execution of an illegal judgment.² The writ will be refused where the general scope or purpose of the action is within the jurisdiction of the superior court, an overstepping of its authority in a portion of its judgment, or any other error in its proceedings, being a ground of appeal or review, but not of prohibition.³

¹ 38 Mo., 296.

² 16 Gratt. (Va.), 270; 21 La. Ann., 113; 13 Minn., 493

³ 43 Barb., 278; 28 How., 497; 18 Abb., 438.

CHAPTER II.

HABEAS CORPUS AND CERTIORARI.

General observations.

The writ of *habeas corpus* is issued to inquire into the grounds upon which any person is restrained of his liberty; and when it is found that the restraint is illegal, to deliver him from such restraint.¹

A person imprisoned or restrained in his liberty, within the State, for any cause, or upon any pretense, is entitled, except in one of the cases specified in the next section, to a writ of *habeas corpus*, or a writ of *certiorari*, as prescribed in this article, for the purpose of inquiring into the cause of the imprisonment or restraint, and, in a case prescribed by law, of delivering him therefrom. A writ of *habeas corpus* may be issued and served under this section, on the first day of the week, commonly called Sunday; but it cannot be made returnable on that day.²

The right to relief from unlawful imprisonment by *habeas corpus* is not the creation of the statute, but exists by common law.³

Where a person is restrained of his liberty, previous adjudications on *habeas* are no answer to a new writ.⁴

The question of the sanity of a person confined in an insane asylum may be tried by this writ.⁵ So, a person confined under a commitment void on its face,⁶ but not one confined under a void sentence but a valid conviction.⁷

¹ 3 Hill, 647, note.

² Code Civ. Pro., § 2015.

³ 60 N. Y., 559.

⁴ 56 N. Y., 182; 1 Hun, 27; 8 How., 288; 13 Abb., 8.

⁵ 11 Abb. N. C., 118.

⁶ 2 N. Y. Cr., 488.

⁷ 97 N. Y., 212.

A person is not entitled to either of the writs specified in the last section, in either of the following cases :

1. Where he has been committed, or is detained, by virtue of a mandate, issued by a court or a judge of the United States, in a case where such courts or judges have exclusive jurisdiction under the laws of the United States, or have acquired exclusive jurisdiction by the commencement of legal proceedings in such a court.

2. Where he has been committed, or is detained, by virtue of the final judgment or decree of a competent tribunal of civil or criminal jurisdiction; or the final order of such a tribunal, made in a special proceeding, instituted for any cause, except to punish him for a contempt; or by virtue of an execution or other process, issued upon such a judgment, decree or final order.¹

In general, this writ to inquire into the cause of detention, in all cases, whether under the statute or at the common law, except when issued by the Supreme Court or one of the justices thereof, can only be allowed for the purpose of delivering the person for whose relief it is asked from illegal imprisonment or restraint. The only exception is in the case of an infant of such tender years as to be incapable of making a choice for itself.²

While the writ of *habeas corpus* is prerogative in its character, it is, nevertheless, a writ demandable as of right, on a proper foundation being made out by proof,³ and it lies in all cases of imprisonment by commitment, detention, confinement or restraint, for whatever cause, or under whatever pretense; in which respect the statute and common law writs are the same.⁴

A prisoner may be brought up on this writ and inquiry made into the jurisdiction of the committing officer or court,⁵ or that the committing court was not legally con-

¹ Code Civ. Pro., § 2016; 6 Civ. Pro., 299; 44 Barb., 98; 25 How., 380; 42 Barb., 479.

² 14 N. Y., 575; aff'g 22 Barb., 179, 183; 1 Duer, 709, etc.

³ 3 Hill, 649, note.

⁴ Bl. Com., 128-133.

⁵ 5 Abb. Pr., 281; 16 Hun, 214.

stituted,¹ the writ may be issued before indictment to inquire whether the evidence was sufficient to hold the prisoner,² to examine into the grounds on which a prisoner is extradited,³ or when the prisoner is improperly held by a coroner,⁴ but it will not issue to inquire into the sufficiency of the indictment,⁵ nor to the correctness of a sentence as to place of imprisonment.⁶

This writ frequently issues for purposes connected with the administration of justice, as for the purpose of bringing the body of a prisoner before the court to testify, or to be arraigned, upon an indictment, or for the purposes of exonerating his bail from liability,⁷ etc.

Although the nature of the writ is, like other prerogative writs, appellate in its character, in that it looks to the case only as it is presented upon the return thereof, yet it will not lie to review the judgment or decision of a court or officer having competent jurisdiction.⁸ Thus, where the *habeas corpus* showed that the person sought to be relieved was detained under a commitment by a magistrate for contempt as a witness, in refusing to answer questions relating to a criminal complaint, it was held that the officer before whom the writ was returnable had no right to inquire into the truth of the facts adjudged by the committing magistrate,⁹ nor whether the questions put to the witness were proper, nor whether he was privileged from answering the same.¹⁰ The officer may inquire whether the process of commitment is valid on its face; or, whether anything has arisen since the commitment for putting an end to the imprisonment; or,

¹ 21 How. Pr., 80; 5 Park. Cr., 42.

² 1 Park. Cr., 187; 18 How., 179.

³ 77 N. Y., 245; 11 Hun, 89; 3 N. Y. Cr., 370.

⁴ 4 Park. Cr., 519.

⁵ 5 Park. Cr., 77.

⁶ 37 How., 494.

⁷ 7 Wend., 132.

⁸ 5 Hill, 164; 23 Barb., 178; Code Civ. Pro., § 2084; 60 N. Y., 599; 1 Abb. N. C., 1; 66 N. Y., 8.

whether the committing magistrate had jurisdiction, etc.,¹ even though the necessary jurisdictional facts are recited in the commitment;¹ but he cannot rejudge the judgment of the committing court or magistrate.¹

Where a justice of the Supreme Court, in court or out of court, has evidence, in a judicial proceeding taken before him, that any person is illegally imprisoned or restrained in his liberty, within the State; or where any other judge, authorized by this article to grant the writs, has evidence, in like manner, that any person is thus imprisoned or restrained, within the county where the judge resides; he must issue a writ of *habeas corpus*, or a writ of *certiorari*, for the relief of that person although no application therefor has been made.²

Where it appears, by proof satisfactory to a court or judge, authorized to grant either writ, that a person is held in unlawful confinement or custody, and that there is good reason to believe, that he will be carried out of the State, or suffer irreparable injury, before he can be relieved by a writ of *habeas corpus* or a writ of *certiorari*; the court or judge must issue a warrant, reciting the facts, directed to a particular sheriff, or generally to any sheriff or constable, or to a person specially designated therein; and commanding him to take, and forthwith to bring before the court or judge, the prisoner, to be dealt with according to law. If the warrant is issued by a court, it must be under the seal thereof; if by a judge, it must be under his hand.³

Where the proof, specified in the last section, is also sufficient to justify an arrest of the person having the prisoner in his custody, as for a criminal offense, committed in taking or detaining him, the warrant must also contain a direction to arrest that person for the offense.⁴

¹ 5 Hill, 164; 22 Barb., 178; Code Civ. Pro., § 2034; 60 N. Y., 599; 1 Abb. N. C., 1; 66 N. Y., 8.

² Code Civ. Pro., § 2025.

³ Code Civ. Pro., § 2054.

⁴ Code Civ. Pro., § 2055.

The officer or other person, to whom the warrant is directed and delivered, must execute it by bringing the prisoner therein named, and also, if so commanded in the warrant, the person who detains him, before the court or judge issuing it; and thereupon the person detaining the prisoner must make a return, in like manner, and the like proceedings must be taken, as if a writ of *habeas corpus* had been issued in the first instance.¹

If the person, having the prisoner in his custody, is brought before the court or judge, as for a criminal offense, he is entitled to be examined, and must be committed, bailed or discharged, by the court or judge, as in any other criminal case of the same nature.²

The writ of *habeas corpus* is not the proper remedy by which to try the right to the guardianship of an infant,³ nor to determine the sufficiency of an affidavit upon which an attachment for a contempt is issued.⁴ The attachment in such case is issued, in the discretion of the court, upon due proof, and upon which the court is to decide as to its sufficiency.⁵ When the court has jurisdiction, both of the person and of the subject matter, the officer issuing the writ of *habeas corpus* cannot, in general, look beyond what appears upon the face of the commitment.

The application for the writ, to whom and how made.

Application for the writ must be made, by a written petition, signed, either by the person for whose relief it is intended, or by some person in his behalf, to either of the following courts or officers:

1. The Supreme Court, at a special or general term thereof, where the prisoner is detained within the judicial district within which the term is held.

¹ Code Civ. Pro., § 2056.

² Code Civ. Pro., § 2057; 4 N. Y. St. Rep., 162.

³ 8 Paige, 47.

⁴ 2 Sandf., 724.

⁵ See 1 Hill, 159; 2 Sandf., 729.

2. A justice of the Supreme Court, in any part of the State.

3. An officer authorized to perform the duties of a justice of the Supreme Court at chambers,[†] being or residing within the city or county, where the prisoner is detained; or, if there is no such officer within that city or county, capable of acting, or, if all those who are capable of acting and authorized to grant the writ, are absent, or have refused to grant it, then to an officer, authorized to perform those duties, residing in an adjoining county.¹ *Habeas* may issue to any part of the State returnable in New York city.²

Under former statute *habeas corpus* could be applied for to a justice of the Supreme court or the court, without reference to place of detention.³

Under the New York statute (1 Rev. Stat., 6th ed., 392, § 27), a special county judge has authority to review, in a *habeas corpus* proceeding, the legality, of one imprisoned under an execution.⁴

Where application for either writ is made as prescribed in subdivision third of the last section, without the county where the prisoner is detained, the officer must require proof, by the oath of the person applying, or by other sufficient evidence, of the facts which authorize him to act as therein prescribed; and if a judge in that county, authorized to grant the writ, is said to be incapable of acting, the cause of the incapacity must be speci-

[†] The officers authorized to perform the duties of justices of the Supreme Court at chambers, under the Code (§ 241) are a judge of a superior city court, within his city, and a county judge, within his county; the superior city courts are, the court of common pleas for the city and county of New York; the superior court of the city of New York; the superior court of Buffalo, and the city court of Brooklyn. City judge of New York could not issue it (36 N. Y., 607), but see, now, L. 1892, ch. 410, § 1521. The Recorder of Albany can issue it (14 Abb. N. S., 414; L. 1872, ch. 284, § 10); and see 46 Hun, 408; S. C., 12 N. Y. St. Rep., 311.

¹ Code Civ. Pro., § 2017.

² 4 Law Bull., 84.

³ 59 How., 287.

⁴ 19 N. Y. St. Rep., 903.

ally set forth. If such proof is not produced, the application must be denied.¹

The affidavit, when application is made to an officer not residing in the county where the petitioner is detained, must explicitly state that there is no officer in the former county authorized to grant the writ. It is not sufficient to state that deponent could find none. It is objectionable if the affidavit be made several days previous to the day on which it is used.²

The petition must be verified by the oath of the petitioner, to the effect that he believes it to be true; and must state, in substance :

1. That the person, in whose behalf the writ is applied for, is imprisoned, or restrained in his liberty; the place where, unless it is unknown, and the officer or person by whom, he is so imprisoned or restrained, naming both parties, if their names are known, and describing either party, whose name is unknown.

2. That he has not been committed, and is not detained, by virtue of any judgment, decree, final order, or process, specified in section 2016 of this act.

3. The cause or pretence of the imprisonment or restraint, according to the best knowledge and belief of the petitioner.

4. If the imprisonment or restraint is by virtue of a mandate, a copy thereof must be annexed to the petition; unless the petitioner avers, either, that by reason of the removal or concealment of the prisoner before the application, a demand of such a copy could not be made, or that such a demand was made, and the legal fees for the copy were tendered to the officer or other person, having the prisoner in his custody, and that the copy was refused.

5. If the imprisonment is alleged to be illegal, the petition must state in what the alleged illegality consists.

¹ Code Civ. Pro., § 2018.

² 18 Abb., 8.

6. It must specify whether the petitioner applies for the writ of *habeas corpus*, or for the writ of *certiorari*.¹

Form of the writ.—The Code prescribes the form of the writ to be used. It is issued in the name of the people of the State of New York, and is directed to the person or officer by whom the prisoner is detained, commanding him to have the body of the prisoner, together with the time and cause of such imprisonment and detention, by whatsoever name the prisoner shall be called or charged, before the justices of the Supreme Court, or some officer, etc., as the case may be, forthwith, or at a specified time to be named therein, etc.² The writ may also be directed to any person who is charged with participating in the illegal detention of the prisoner, though he may not be the immediate actor.³ The writ should state the place of the return, as well as the officer or court before whom it is returnable.⁴

When the object of the writ is to determine the rightful custody and disposition of an infant, the application should be made to the Supreme Court or to one of its justices. The application, in such case, is under the common law, and not under the statute, unless the proceeding is upon the application of the husband or wife, made under the statute, representing that the wife or her husband has attached him or herself to the society of shakers, and detains a child of the marriage between them, etc.⁵ A judge of the Superior Court of the city of New York is not clothed with the discretionary powers of a judge in equity, in relation to the custody and disposition of infants.⁶ Nor is a recorder of a city, a county judge or a judge of the Court of Common Pleas of the city and county of New York; nor is a justice of the Supreme Court, in respect to the statutory writ of *habeas corpus*,

¹ Code Civ. Pro., § 2019.

² Code Civ. Pro., § 2021. See forms.

³ See 3 Hill, 406.

⁴ Code Civ. Pro., § 1998.

⁵ 2 R. S., 149, § 4.

⁶ 1 Duer, 709; 8 How., 286.

returnable before him at chambers, clothed with such discretionary powers. In such cases, the petition must be addressed to the Supreme Court in equity, and then it may be presented to a justice thereof, at chambers, out of term, and such justice would have power to entertain such proceeding.¹

A court or a judge, authorized to grant either writ, must grant it without delay, whenever a petition therefor is presented, as prescribed in the foregoing sections of this article, unless it appears, from the petition itself, or the documents annexed thereto, that the petitioner is prohibited by law from prosecuting the writ. For a violation of this section, a judge, or, if the application was made to a court, each member of the court, who assents to the violation, forfeits to the prisoner one thousand dollars, to be recovered by an action in his name, or in the name of the petitioner to his use.²

Seal of what court.—The Code also provides that the writ must be under the seal of the court by which it is awarded; and when it is allowed by a judge out of court, and is returnable before a court of record, it must be issued under the seal of the court before which it is returnable; and; if made returnable before a judge out of court, or before a body or tribunal, other than a court of record, it must be issued under the seal of the Supreme Court. Where the seal of the Supreme Court is to be used, it may be the seal of the county wherein the writ is awarded, or wherein it is returnable.³

The indorsement.—The writ must also be indorsed with a certificate that the same has been allowed, together with the date of its allowance.⁴ When the writ is awarded by the court, the indorsement must be signed by the chief justice or other presiding officer of such court; if awarded by an officer out of court, the indorse-

¹ 22 Barb., 179; 14 N. Y., 575; 59 How., 114.

² Code Civ. Pro., § 2020; 36 N. Y., 607; 33 How., 384; 16 Abb., 281; 25 How., 307.

³ Code Civ. Pro., § 1992.

⁴ Code Civ. Pro., § 1996.

ment must be signed by such officer; and whenever the writ is required in an action or matter to which the people of the State are parties, on the application of the attorney-general, or district attorney having charge of the same, the fact that it was issued upon such application must be stated in their indorsement of the allowance.¹

A court or judge allowing a writ, directed to any person other than a sheriff, coroner, constable, or marshal, may, in its or his discretion, require the applicant, in order to render the service complete, to pay the charges of bringing up the prisoner; in that case, the amount of the charges, not to exceed the fees allowed by law to a sheriff for a similar service, must be specified in the certificate allowing the writ.²

This writ may be amended, on motion, like other processes, in the discretion of the court.³

The writ of *habeas corpus* or the writ of *certiorari* shall not be disobeyed, for any defect of form, and particularly in either of the following cases:

1. If the person having the custody of the prisoner, is designated, either by his name of office, if he has one, or by his own name; or, if both names are unknown or uncertain, by an assumed appellation. Any person upon whom the writ is served, is deemed to be the person to whom it is directed, although it is directed to him by a wrong name or description, or to another person.

2. If the prisoner directed to be produced, is designated by name, or otherwise described in any way, so as to be identified as the person intended.⁴

How and by whom the writ to be served.

A writ of *habeas corpus* can be served only by an elector of the State. Where the prisoner is in custody of a sheriff, coroner, constable, or marshal, the service is not

¹ Code Civ. Pro., § 1993.

² Code Civ. Pro., § 2001.

³ 3 H'il, 657, note, etc.

⁴ Code Civ. Pro. § 2024.

complete, unless the person serving the writ tenders to the officer, the fees allowed by law for bringing up the prisoner, and delivers to him an undertaking, with at least one surety, in a sum specified therein, to the effect, that the surety will pay the charges of carrying back the prisoner, if he shall be remanded; and that the prisoner will not escape by the way, either in going to, remaining at, or returning from the place to which he is to be taken. The sum so specified must be, at least, twice the sum for which the prisoner is detained, if he is detained for a specific sum of money; if not, it must be one thousand dollars.¹

These provisions, however, do not apply to any case where the writ is sued out by the attorney-general or district attorney.²

Notice of time and place of return of writ must be served on person interested in continuing the imprisonment, or his attorney or the district attorney.³

Except where special provision is otherwise made in this act, a State writ must be personally served, in like manner as a summons, issued out of the supreme court; and each provision of this act, relating to the personal service of such a summons upon a defendant, applies to the service of a State writ.⁴

A writ of *habeas corpus* or of *certiorari*, issued as prescribed in article second or article third of this title, may be served by delivering it to the person to whom it is directed. If he cannot be found, with due diligence, it may be served by leaving it, at the jail or other place in which the prisoner is confined, with any under officer, or other person of proper age, having charge, for the time, of the prisoner, and paying or tendering to him the fees or charges for bringing up the prisoner. If the person, upon whom the writ ought to be served, keeps him-

¹ Code Civ. Pro., § 2000.

² Code Civ. Pro., § 2002.

³ 48 Hun, 165; S. C., 15 N. Y. St. Rep., 640

⁴ Code Civ. Pro., § 1999.

self concealed, or refuses admittance to the person attempting to serve it, it may be served by affixing it in a conspicuous place, on the outside, either of his dwelling-house, or of the place where the prisoner is confined. In that case, the service is complete, without tendering the fees or charge for bringing up the prisoner.¹

A sheriff, coroner, constable or marshal, upon whom complete service of a writ of *habeas corpus* is made, as prescribed in this article, must obey and make return to the writ, according to the exigency thereof, whether it is directed to him or not. Any other person, upon whom such a writ is served, having the custody of the individual for whose benefit it was issued, must obey and execute it according to the command thereof, without requiring any bond, or the payment of any charges, except such as are specified in the certificate allowing the writ.²

It is likewise the duty of the person upon whom the writ of *certiorari*, issued in pursuance of these provisions, shall have been served, and upon the payment or tender of fees allowed by law for making a return to such writ, and for copying the warrant or other process to be annexed thereto, to obey and return the same according to the exigency thereof.³

Proceedings in case of disobedience.

Where a person, who has been duly served with either writ, refuses or neglects, without sufficient cause shown by him, fully to obey it, as prescribed in the last two sections, the court or judge, before which or whom it is made returnable, upon proof of the due service thereof, must forthwith issue a warrant of attachment, directed generally to the sheriff of any county where the delinquent may be found, or, if the delinquent is a sheriff, to any coroner of his county, or to a particular person specially appointed to execute the warrant, and desig-

¹ Code Civ. Pro., § 2008.

² Code Civ. Pro., § 2004.

³ Code Civ. Pro., § 2005.

nated therein, commanding such officer or other person forthwith to apprehend the delinquent, and bring him before the court or judge. Upon the delinquent being so brought up, an order must be made, committing him to close custody in the jail of the county in which the court or judge is; or, if he is a sheriff, in the jail of a county other than his own, designated in the order, and, in either case, without being allowed the liberties of the jail. The order must direct that he stand committed, until he makes return to the writ, and complies with any order, which may be made by the court or judge, in relation to the person for whose relief the writ was issued.¹

The court or judge may also, in its or his discretion, at the time when the warrant of attachment is issued, or afterwards, issue a precept to the sheriff, coroner, or other person, to whom the warrant is directed, commanding him forthwith to bring before the court or judge the person for whose benefit the writ was granted, who must thereafter remain in the custody of the officer or person executing the precept, until discharged, bailed, or remanded, as the court or judge directs.²

The sheriff, coroner, or other person, to whom a warrant of attachment or precept is directed, as prescribed in either of the last two sections, may, in the execution thereof, call to his aid the power of the county, as the sheriff may do, in the execution of the mandate issued from a court of record.³

The return of such writ.

Such writ is made returnable at a day certain, named therein, or forthwith, as the case may require.⁴ If the writ be made returnable at a certain day, the writ must be returned and be produced at the time and place specified therein; and if it be returnable forthwith, and the place be within twenty miles of the place of service, the

¹ Code Civ. Pro., § 2028; 3 Abb. N. C., 65.

² Code Civ. Pro., § 2029.

³ Code Civ. Pro., § 2030.

⁴ Code Civ. Pro., § 1998.

return must be made and the prisoner be produced within twenty-four hours, and the like time shall be allowed for every additional twenty miles.¹

The person upon whom either writ has been duly served, must state plainly and unequivocally in his return:

1. Whether or not, at the time when the writ was served, or at any time theretofore or thereafter, he had in his custody, or under his power or restraint, the person for whose relief the writ was issued.

2. If he so had that person, when the writ was served, and still has him, the authority and true cause of the imprisonment or restraint, setting it forth at length. If the prisoner is detained by virtue of a mandate, or other written authority, a copy thereof must be annexed to the return, and, upon the return of the writ, the original must be produced and exhibited to the court or judge.

3. If he so had the prisoner at any time, but has transferred the custody or restraint of him to another, the return must conform to the return required by the second subdivision of this section, except that the substance of the mandate or other written authority may be given, if the original is no longer in his hands; and that the return must state particularly to whom, at what time, for what cause and by what authority the transfer was made.

The return must be signed by the person making it, and, unless he is a sworn public officer, and makes his return in his official capacity, it must be verified by his oath.²

The sworn statement of one of the parties, custody of whose person is sought to be obtained, but on whom the writ was not served by the relator, is not admissible as a return.³ To a writ, directed to a military officer, the respondent made return that "the within named S. is not

¹ Code Civ. Pro., § 2006.

² 1 Code Civ. Pro., § 2026; 20 N. Y. St. Rep., 77.

³ 8 Paige, 47.

in my custody," it was held insufficient, on the ground that he should have returned that S. was not in his possession or power.¹

The return may be amended by leave of the court at any time before the decision is made, and it may be amended either in its substance or its form,² and it should be amended by the one making the defective return.³ As to when demurrer to return setting forth facts under oath, amounts to their admission, see 15 N. Y. St. Rep., 121.

The person, upon whom a writ of *habeas corpus* has been duly served, must also bring up the body of the prisoner in his custody, according to the command of the writ; unless he states in his return that the prisoner is so sick or infirm that the production of him would endanger his life or his health.⁴

Proceedings after the return of the writ—Notice to other parties.

Where it appears, from the return to either writ, that the prisoner is in custody by virtue of a mandate, an order for his discharge shall not be made until notice of the time when, and the place where, the writ is returnable, or to which the hearing has been adjourned, as the case may be, has been either personally served, eight days previously, or given in such other manner, and for such previous length of time, as the court or judge prescribes, as follows :

1. Where the mandate was issued or made in a civil action or special proceeding, to the person who has an interest in continuing the imprisonment or restraint, or his attorney.

2. In every other case, to the district attorney of the county, within which the prisoner was detained, at the time when the writ was served.

¹ 10 Johns., 328.

² 10 Mod., 102.

³ 8 Hill, 657, note.

⁴ Code Civ. Pro., § 2027.

For the purpose of an appeal, the person to whom notice is given, as prescribed in the first subdivision of this section, becomes a party to the special proceeding.¹

Notice must be given, even where the party does not reside in the county where the party sought to be relieved resides, or where the proceedings are to be had. The party interested is entitled to notice of the proceedings, without regard to his place of residence,² although copies of the petition and other papers need not be served upon him.³ Such interested parties residing in other counties, notice may be served upon them by mail, when the communication is regular between them. In such case, the service is made by enclosing the notice in a wrapper, and putting the same in the post-office, properly directed, and paying the postage thereon.

The court or judge, before which or whom a prisoner is brought by virtue of a writ of *habeas corpus*, issued as prescribed in this article, must, immediately after the return of the writ, examine into the facts alleged in the return, and into the cause of the imprisonment or restraint of the prisoner; and must make a final order to discharge him therefrom, if no lawful cause for the imprisonment or restraint, or for the continuance thereof, is shown, whether the same was upon a commitment for an actual or supposed criminal matter, or for some other cause.⁴

If the facts are not denied, the law of the case is alone inquired into.⁵ But if issue is taken upon material facts in the return, or if other facts are alleged to show the imprisonment to be illegal, or that the party is entitled to his discharge, the court or officer proceeds at once to

¹ Code Civ. Pro., § 2038.

² 14 Wend., 48.

³ 12 Wend., 229.

⁴ Code Civ. Pro., § 2031; 25 Wend., 483; 5 Cow., 39; 1 Daly, 562; 1 Park. Cr., 129; 26 Barb., 78. 2 Park. Cr., 650; 5 Hill, 164; 34 How., 259; 4 Park. Cr., 166; 1 Abb. N. C., 1; 37 How., 494.

⁵ 3 Hill, 658; note, pl. 28; 4 Barb., 41.

hear the allegations and proofs, and disposes of the party according to the justice of the case.¹

A prisoner, produced upon the return of a writ of *habeas corpus*, may, under oath, deny any material allegation of the return, or make any allegation of fact, showing either that his imprisonment or detention is unlawful, or that he is entitled to his discharge. Therupon the court or judge must proceed, in a summary way, to hear the evidence produced in support of or against the imprisonment or detention, and to dispose of the prisoner as the justice of the case requires.²

On proof of facts that one arrested for breach of excise laws sold liquor on Sunday, without license, the writ will be dismissed.³

A summary conviction cannot be set aside on *habeas corpus* or *certiorari*, on averments and proof made before the court that the fact proved before the magistrate on which conviction depended was not true; that the real fact was otherwise, and, if known, would have entitled the accused to a discharge.⁴

Where the commitment recites the several facts necessary to show jurisdiction and conviction on sufficient evidence of alleged charge, the petitioner should be remanded even though there be some slight imperfection or defect in the form.⁴

The court or judge must forthwith make a final order to remand the prisoner, if it appears that he is detained in custody for either of the following causes, and that the time for which he may legally be so detained has not expired:

1. By virtue of a mandate issued by a court or a judge of the United States, in a case where such courts or judges have exclusive jurisdiction.
2. By virtue of the final judgment or decree of a com-

¹ Code Civ. Pro., § 2039; 15 Barb., 153; 1 Duer, 709.

² 7 N. Y. St. Rep., 769, rev'd, 10 Id., 80.

³ 106 N. Y., 604; 9 N. Y. St. Rep., 95; 44 Hun, 526.

⁴ 4 N. Y. St. Rep., 659.

petent tribunal, or civil or criminal jurisdiction; or the final order of such a tribunal, made in a special proceeding, instituted for any cause, except to punish him for a contempt; or by virtue of an execution or other process, issued upon such a judgment, decree, or final order.

3. For a criminal contempt, defined in section 8 of this act, and specially and plainly charged in a commitment, made by a court, officer, or body, having authority to commit for the contempt so charged.¹

If it appears upon the return, that the prisoner is in custody by virtue of a mandate in a civil cause, he can be discharged, only in one of the following cases:

2. Where the jurisdiction of the court which, or of the officer who, issued the mandate, has been exceeded, either as to matter, place, sum, or person.

2. Where, although the original imprisonment was lawful, yet by some act, omission, or event, which has taken place afterwards, the prisoner has become entitled to be discharged.

3. Where the mandate is defective in a matter of substance required by law, rendering it void.

4. Where the mandate, although in proper form, was issued in a case not allowed by law.

5. Where the person, having the custody of the prisoner under the mandate, is not the person empowered by law to detain him.

6. Where the mandate is not authorized by a judgment, decree, or order of a court, or by a provision of law.²

But a court or judge, upon the return of a writ issued as prescribed in this article, shall not inquire into the legality or justice of any mandate, judgment, decree, or final order, specified in the last section but one, except as therein stated.³

¹ Code Civ. Pro., § 2032; 60 N. Y., 599; 16 Hun, 214; 14 Id., 21; 11 Id., 89; 77 N. Y., 245.

² Code Civ. Pro., § 2033; 20 Hun, 547; 20 N. Y. St. Rep., 48.

³ Code Civ. Pro., § 2034.

If it appears that the prisoner has been legally committed for a criminal offense, or if he appears, by the testimony offered with the return, or upon the hearing thereof, to be guilty of such an offense, although the commitment is irregular, the court or judge, before which or whom he is brought, must forthwith make a final order to discharge him upon his giving bail, if the case is bailable; or, if it is not bailable, to remand him. Where bail is given pursuant to an order, made as prescribed in this section, the proceedings are the same as upon the return to a writ of *certiorari*, where it appears that the prisoner is entitled to be bailed.¹

Where a prisoner is not entitled to his discharge, and is not bailed, he must be remanded to the custody, or placed under the restraint, from which he was taken, unless the person in whose custody or under whose restraint he was is not lawfully entitled thereto; in which case, the order remanding him must commit him to the custody of the officer or person so entitled.² Pending the proceedings, and before a final order is made upon the return, the court or judge, before which or whom the prisoner is brought, may either commit him to the custody of the sheriff of the county wherein the proceedings are pending, or place him in such care or custody as his age and other circumstances require.³

If the prisoner is imprisoned on execution, the sheriff will be liable for an escape if he voluntarily suffers him to go at large without restraint.⁴ It is held, however, that the *habeas corpus* relieves the prisoner temporarily from the duress of imprisonment under the execution, and that he is not then enduring the restraint created thereby with the view of coercing payment.⁵ Therefore the sheriff is not bound to keep the prisoner always in sight with the same strictness as before.

¹ Code Civ. Pro., § 2035.

² Code Civ. Pro., § 2036.

³ Code Civ. Pro., § 2037.

⁴ 10 Paige, 606.

⁵ 18 Johns., 48; 7 Wend., 132.

What may be Inquired into, on the return of the writ, by the court or officer hearing the same.

When it appears, by the return, that the prisoner is detained by virtue of any civil process from any court, legally constituted, or issued by any officer in the course of judicial proceedings before him, authorized by law, and the process is valid upon its face, the presumption will be in favor of the legality of such imprisonment; and the burden of impeaching its legality will be thrown upon the prisoner. But he is at liberty to impeach it, by showing want of jurisdiction in the court or magistrate from whence it emanated,¹ or that the court had exceeded its jurisdiction in this particular case, either as to matter, place, sum or person.²

The process may also be attacked by showing that there has been some act, omission or event, which has taken place since the issuing of such process, which entitles the party to be discharged therefrom.³ The court may also inquire whether the process, though proper in form, was issued in a case legally allowable, or whether it was issued in accordance with any provision of law.⁴ Thus, if the defendant has been taken in execution, the court may inquire whether the judgment authorized the issuing of an execution against the body of the defendant; and if not, whether there is record evidence sufficient to justify issuing the same.⁵ Thus, where an execution was issued on a judgment rendered in an action against an innkeeper, for the loss of the baggage of his guest, and the defendant was taken in execution, the court held, that on a *habeas corpus* issued to inquire into the cause of the capture and detention of defendant, it might proceed to inquire whether the process, though

¹ 3 Hill, 661, note pl. 31; 1 Sandf., 702; 2 Park. Cr. R., 650.

² Code Civ. Pro., 2033, sub. 1.

³ Idem, sub. 2; 1 Hill, 337; 25 Wend., 483.

⁴ Idem, sub. 4, 6; 3 Hill, 661, note pl. 31, 37.

⁵ 26 Barb., 80; 15 How., 211.

proper in form, was allowable by the law in the case, and whether it was authorized by a judgment or decree of a court, or by a provision of law.¹ And where an order of court was necessary to the issuing of such execution, such order should also appear, or at least, the facts entitling the judgment creditor to such an order should also appear, or at least, the facts entitling the judgment creditor to such an order should appear to have been established.¹

But, on such return, a court or judge cannot inquire into the legality or justice of any mandate, judgment, decree or final order specified in section 2032 of the Code,² nor into the justice or propriety of any commitment for a contempt made by any court, officer or body, according to law, and charged in such commitment. Thus, where the return shows that the prisoner is detained under a commitment for contempt as a witness, in refusing to answer questions relating to a criminal complaint, the court has no right to inquire into the truth of the facts adjudged by the committing magistrate, nor as to propriety of the questions put to such witness, nor as to his privilege from answering the same.³

But the question of the jurisdiction of the court committing, is open to inquiry, even where the imprisonment is under the asserted authority of the United States.⁴ And the jurisdiction may be inquired into where the commitment recites the necessary facts to confer jurisdiction.⁵

Under the Code, the party brought before the court on *habeas corpus*, is permitted to deny any of the material facts set forth in the return, or allege any fact to show either that his imprisonment or detention is unlawful, or that he is entitled to his discharge.⁶ It is

¹ 26 Barb., 80.

² Code Civ. Pro., § 2034.

³ 5 Hill, 164; 11 How., 418.

⁴ 3 Hill, 651, note; 6 Johns., 337.

⁵ 5 Hill 164, 168; 5 Abb., 281; 15 How., 210.

⁶ Code Civ. Pro., § 2039.

held that this provision of the statute does not authorize a summary trial as to the guilt or innocence of the prisoner; but only to enable him by evidence *aliunde* the return, to dispute the facts of his detention on the process or proceeding set forth; or to impeach it for lack of jurisdiction; or to show that by some subsequent event, as pardon, a reversal of judgment, etc., it had ceased to be a lawful detention.¹ Accordingly, where the return the party to be detained on process, the existence and validity of the process are the only material facts within this provision of the Code, upon which issue can be taken.² Where the process is sufficient to protect the officer and party, the imprisonment is lawful.³

In proceedings under this writ, the court or officer is confined to questions of jurisdiction, and to what may be called *prima facie* appearance of the proceedings, without raising any collateral issues, or impeachments of records, deeds or papers fair on their face.⁴ Thus, where a pardon was alleged in answer to a return on a *habeas corpus*, the court cannot go behind the pardon, and inquire whether it was fraudulently obtained.⁵ BRONSON, J., held that this provision of the statute was intended mainly for cases where the party was restrained of his liberty without the authority of legal process.⁶

Evidence.—It is held that the prisoner may prove the writings or document on which his arrest is founded, and what they contain, by the best evidence at hand, or which he can procure with reasonable diligence, without regard to the ordinary rules of evidence.⁷ But the prisoner himself is not a competent witness to support the application for his discharge.⁸

¹ 1 Hill, 337; 25 Wend., 483, 570.

² 3 Hill, 658, note.

³ 8 How., 488, 483; see 1 Barb., 340, also 193; 1 Park. Cr. R., 187.

⁴ 5 Hill, 168.

⁵ Hurd on Hab. Cor., 304; 1 Sandf., 702.

⁶ 5 Hill, 17; 1 Park. Cr. R., 169; 5 N. Y., 333

How far the decision on habeas corpus is conclusive on the parties.

Such adjudication is conclusive upon the same parties in all future controversies relating to the same subject matter, and upon the same state of facts.¹ But where circumstances have so far changed as to affect the application of the principle of the decision to the particular case, the former proceedings would not be a bar to future action in respect thereto. Thus, when a father obtained a *habeas corpus* for his infant child, detained by its mother, and the court had on several occasions refused to interfere with the custody of the mother on account of the tender age of the child, yet about eighteen months afterwards the court held that the former proceedings were not a bar to the proceedings then being had, by reason of the greater age of the child at that time. That the circumstances had so changed by reason of the greater age of the child as to render it proper that the father's rights should be enforced.²

The question whether a proceeding by *habeas corpus* is barred by a previous proceeding is to be determined by the identity or non-identity of the questions to be settled by such several adjudications.³

Concealing the prisoner with intent to elude the service of the writ, penalty therefor.

Any one having in his custody, or under his power, a person entitled to a writ of *habeas corpus* or a writ of *certiorari*, as prescribed in this article, or a person for whose relief a writ of *habeas corpus* or a writ of *certiorari* has been duly issued, as prescribed in this article, who, with intent to elude the service of the writ, or to avoid the effect thereof, transfers the prisoner to the custody, or places him under the power or control, of another, or conceals him, or changes the place of his confinement,

¹ 25 Wend., 64; 1 Park. Cr. R., 129.

² 3 Hill, 400.

³ See 3 Park. Cr. R., 531.

is guilty of a misdemeanor; and, upon conviction thereof, shall be punished as specified in the last section.¹

A person who knowingly assists in the violation of the last section is guilty of a misdemeanor; and, upon conviction thereof, shall be punished as specified in the last section but one.²

An officer or other person, who detains any one by virtue of a mandate, or other written authority, must, upon reasonable demand and tender of his fees, deliver a copy thereof to any person who applies therefor, for the purpose of procuring a writ of *habeas corpus* or a writ of *certiorari* in behalf of the prisoner. If he knowingly refuses so to do, he forfeits two hundred dollars to the prisoner.³

Proceedings in respect to infants.

In cases affecting the custody of infants, it is held that the writ of *habeas corpus* is issued at common law and not under the statute, except in certain cases hereinafter noticed.⁴ In such cases the court acts in virtue of its equity powers; and a justice of the court, in virtue of his powers as chancellor.⁵ The authority of the court in such cases is that which is inherent in a court of equity and is derived from the common law, but to be exercised in conformity to the provisions of the statute to the extent they are applicable.⁶

As a general rule, the father is entitled to the custody of his infant children; but he holds this right subject to the supervision of equity,⁷ which will award the custody of the infant, in accordance with what the interest and welfare of the infant demands. As between the father and mother, where they are living separate, if the infant

¹ Code Civ. Pro., § 2052.

² Code Civ. Pro., § 2053.

³ Code Civ. Pro., § 2065.

⁴ 1 Duer, 709; 22 Barb., 179; 14 N. Y., 575; 8 How., 288.

⁵ 1 Duer, 709; 8 How., 288.

⁶ 14 N. Y., 575; 8 Paige, 47; Code Civ. Pro., § 2066.

⁷ 8 Hill, 400; 18 Wend., 637; 24 Barb., 521.

be of tender years and the mother be a suitable person to have the custody of it, it will be awarded to the mother.¹ So when the conduct of the father is brutal, or where his principles and habits are immoral, he may forfeit his right to the custody of his child.² The wish of the child will also be consulted when of sufficient age to exercise a proper choice.³ But where the child is too young to be capable of determining for itself, the court will determine for it, and in doing so, will have respect to the future welfare of the child.⁴ Where the child is old enough to understand its own interest, and to have a will in respect thereto, the court will see that it is left free to exercise its own choice.⁵ The course and practice of the court in these cases is to deliver the party from illegal restraint; and, if competent to form and declare an election, then to allow the infant to go where or with whom it pleases; but if, in the opinion of the court, the infant be too young to form a judgment, then the court is to exercise its own judgment in that respect.⁶

It is not the object of this writ to try the right of parents or guardians to the custody of infants, but to deliver them from unjust imprisonment and illegal restraint; when, therefore, the infant has been brought before the court, if of proper age, it has been consulted in relation to its wishes.⁷

Statutory provisions in respect thereto.

It is provided by statute that when the husband and wife shall live in a state of separation, without being divorced, and shall have any minor child of the mar-

¹ 25 Wend., 64.

² 18 Wend., 637; 19 Id., 16; 24 Barb., 521.

³ 1 Sandf., 672; 8 Johns., 329; 8 How., 288.

⁴ 6 Barb., 366; 22 Id., 178; 14 N. Y., 575.

⁵ 1 Sandf., 672; 8 Johns., 329; 8 How., 288; 13 Johns., 418; 3 Burr., 1436.

⁶ 4 Johns. Ch. R., 80; see 1 Str., 579; 2 Ld. Raym., 1333; 3 Burr., 1436; 1 Str., 444; 3 P. Wms., 151; Hurd on Hab. Cor., 474.

⁷ 8 Johns., 328.

riage, the wife, being an inhabitant of this State, may apply to the Supreme Court for a *habeus corpus* to have such minor child brought before such court; and that on the return of such writ, the court, on due consideration, may award the charge and custody of the child to the mother, for such time, under such regulations and restrictions, and with such provisions and directions, as the case may require. Which order may be annulled, varied or modified by the said court at any time thereafter.¹

The application for the writ, in these cases, is to the Supreme Court,² and is addressed to its discretion. It will, therefore, be necessary for the applicant to disclose fully all the facts in the case, that the court may see the propriety of granting the writ. In determining the question of the custody of the infant, the court, as its legal guardian and protector, has reference to its interest and welfare,³ and will make such determination in the premises as its interest and welfare seem to demand.⁴ The court is not at liberty to retry so much of the charges in a summary proceeding as had been found by the justice to have been proven before him.⁵ The ability and fitness of the parent to provide for the child will be examined into, in determining such question.⁶

In these cases, the statute authorizes the court to interfere only on the application of the wife. This is upon the hypothesis that the husband and father is entitled to the custody of his children. But the father has not an absolute and unalienable right to such custody. He may be disqualified from exercising it, or he may, by misconduct, etc., forfeit his right. He is subject to control by a court of equity, which has a supreme supervision in these matters.⁷

¹ 2 R. S., 148, §§ 1, 2, 3.

² 24 Barb., 521.

³ Hurd on Hab. Cor., 504; citing 5 Binn., 520; 3 Burr., 1436.

⁴ 32 N. Y. St. Rep., 822.

⁵ 2 How., 61; 18 Wend., 637; 8 Paige, 48.

⁶ 25 Wend., 64; 6 Rich., 344; 13 Johns., 418; 1 P. A. Brown, 143.

Where the proceeding is a contest between parents in relation to the future charge and custody of their children, and not for the purpose of delivering the infant from any improper restraint, it is not necessary, although it is not improper, for the court to consult the children in relation to their situation and wishes for the future. Nor will the court interfere, as a matter of course, but only upon sufficient grounds.¹

In deciding upon the question of the infant's custody, the courts are governed by what appears to be for the *interest of the infant*, and not the superior rights or claims thereto of the respective parents. To ascertain what is for the interest of the infant, the court will look into all the circumstances of the case. And as one of the circumstances, when the infant is of suitable age, the court will consult its wishes, not because the infant has a legal right to determine the question by its will, but because its will is one of the circumstances which it is proper for the court to consider in determining its rightful custody.²

The withholding of a child from its legal guardian, and delivering it to other control or custody, when such disposition is for the best interests of the child, is a matter which rests very largely in the discretion of the court or officer who issues the writ of *habeas corpus*.³

The statute also provides for a proceeding by *habeas corpus* by either a husband or wife, under the following circumstances: "Whenever application is made to [the chancellor] a justice of the Supreme Court, or any [circuit judge] by any husband or wife, representing that the wife or husband has attached him or herself to the society of shakers, and detains a child of the marriage between them, the officer must inquire into the circumstances; and if satisfied by due proof of the facts repre-

¹ 18 Wend., 637.

² Hurd on Hab. Cor., 527.

³ 33 N. Y. St. Rep., 230.

sented, he must allow a writ of *habeas corpus* to bring such child before him.¹

It further provides that in case the child is concealed or secreted by or among any society of shakers, the officer may also issue his warrant to the sheriff of the proper county, commanding him, in the daytime, to search the dwelling houses and other buildings of the society, or the dwelling houses and buildings of any of the members thereof, or of any other buildings specified therein, for such child, and to bring him before such officer.² The child being produced before the officer, its custody may be awarded to that parent which has not joined the shakers, for such time, under such regulations, and with such provisions and directions, as shall be deemed proper.³

It would not seem, from the language of the statute, that the officer is bound to deliver the infant in such case to the custody of that parent which had not united with the shakers; but was left to exercise his discretion in view of all the circumstances. Thus, the officer might free the infant from all restraint, and permit it to exercise its own choice as to the parent with whom it would remain.⁴

Proceedings in this class of cases are properly conducted according to the provisions of the Code.⁵ The officer before whom the infant is brought will hear all the proofs and allegations of the parties for the purpose of determining the question of the lawfulness of the detention. The infant being detained by parental authority, and not being entitled to be free therefrom, if it is properly exercised, the court is at liberty to give any latitude to the investigation necessary to determine what the welfare of the infant demands.

¹ 2 R. S., 149, § 4; 2 N. Y. S. at L., 155.

² *Idem*, § 5.

³ *Idem*, § 6.

⁴ See 1 Sandf., 675.

⁵ Code, § 2039, *ante*. See 18 Wend., 640; 3 Hill, 647.

When the writ should be certiorari.

Where an application is made for a writ of *habeas corpus*, as prescribed in this article, and it appears to the court or judge, upon the petition and the documents annexed thereto, that the cause or offense, for which the party is imprisoned or detained, is not bailable, a writ of *certiorari* may be granted instead of a writ of *habeas corpus*, as if the application had been made for the former writ.¹

Upon the return to such a writ of *certiorari*, the court or judge, before which or whom it is returnable, must proceed as upon a return to a writ of *habeas corpus*, and must hear the proofs of the parties, in support of and against the return.²

If it appears that the prisoner is unlawfully imprisoned or restrained in his liberty, the court or judge must make a final order, discharging him forthwith. If it appears that he is lawfully imprisoned or detained, and is not entitled to be bailed, the court or judge must make a final order, dismissing the proceedings.³

If, upon the return to a writ of *certiorari*, issued as prescribed in this article, it appears that the person imprisoned or detained is entitled to be bailed, the court or judge must make a final order, fixing the sum in which he is to be admitted to bail; specifying the court and the term thereof, at which he is required to appear, and directing his discharge, upon bail being given accordingly, as required by law. If sufficient bail is immediately offered, the court or judge must take it; otherwise, bail may be given afterwards, as prescribed in the next section.⁴

Upon the production of the order, or, if it was made by a court, of a certified copy thereof, to a justice of the Supreme Court, or to the county judge or special county

¹ Code Civ. Pro., § 2041; 1 Barb., 349.

² Code Civ. Pro., § 2042.

³ Code Civ. Pro., § 2043.

⁴ Code Civ. Pro., § 2045.

judge of the county, or to a judge of a superior city court of the city, where the prisoner is detained; the judge must take the recognizance of the prisoner, with two sureties, in the sum so fixed, conditioned for the appearance of the prisoner, as prescribed in the order. Each person, offering himself as a surety, must show, by his oath, to the satisfaction of the judge, that he is a householder in the county, and worth twice the sum in which he is required to be bound, over and above all demands against him. It is not necessary that the prisoner should appear in person before the judge, to acknowledge the recognizance; but it may be acknowledged by the prisoner, and certified, in like manner as a deed to be recorded in the county.¹

The judge must immediately file the recognizance with the clerk of the court, before which the prisoner is bound to appear. He must also make a certificate upon the order, or the certified copy thereof, to the effect that it has been complied with. Upon production of the certificate, the prisoner is entitled to his discharge from imprisonment, for any cause stated in the return to the *certiorari*.²

The writ of discharge is abolished. A final order to discharge a prisoner, made as prescribed in this article, may be served in like manner as an injunction order, and when so served, it may be enforced in the same manner as a final judgment in a civil action, except where special provision for its enforcement is otherwise made in this act. Where such an order directs a discharge, upon giving bail, the service thereof is not complete until service of the certificate, or other proof prescribed by law, showing that bail has been given, as required thereby.³

As to costs in *habeas corpus*, see 11 Hun, 468; 16 N. Y. St. Rep., 240; 30 Hun, 394; Code Civ. Pro., § 2007.

¹ Code Civ. Pro., § 2046.

² Code Civ. Pro., § 2047.

³ Code Civ. Pro., § 2048.

Obedience to a final order to discharge a prisoner, made as prescribed in this article, may be enforced by the court which, or the judge who, made the same, by attachment, as for a neglect to make a return to a writ of *habeas corpus*, and with like effect. A person guilty of such disobedience forfeits to the prisoner aggrieved one thousand two hundred and fifty dollars, in addition to the damages which the latter sustains.¹

A prisoner who has been discharged by a final order, made upon a writ of *habeas corpus* or *certiorari*, issued as prescribed in this article, shall not be again imprisoned, restrained, or kept in custody, for the same cause. But it is not deemed to be the same cause, in either of the following cases:

1. Where he has been discharged from a commitment on a criminal charge; and afterwards committed for the same offense by the lawful order or other mandate of the court, wherein he was bound by recognizance to appear, or in which he has been indicted or convicted for the same offense.

2. Where he has been discharged, in a criminal cause, for defect of proof, or for a material defect in the commitment; and is afterwards arrested on sufficient proof, and committed by a lawful mandate, for the same offense.

3. Where he has been discharged, in a civil action or special proceeding, for an illegality in the judgment, final order, or other mandate, as prescribed in this article; and is afterwards imprisoned, by virtue of a lawful judgment, final order, or other mandate, for the same cause of action.

4. Where he has been discharged, in a civil action or special proceeding, from imprisonment by virtue of an order of arrest; and is afterwards taken in execution, or other final process, in the same action or special proceeding, or arrested in another action or special proceeding, after the first was discontinued.²

¹ Code Civ. Pro., § 2049.

² Code Civ. Pro., § 2050; 1 Abb. N. S., 432; 7 Hill, 801; 15 Johns., 152; 11 N. Y. St. Rep., 558.

If a court, or a judge, or any other person, in the execution of a judgment, order, or other mandate, or otherwise knowingly violates, causes to be violated, or assists in the violation of the last section, he, or if the act or omission was that of a court, each member of the court assenting thereto, forfeits, to the prisoner aggrieved, one thousand two hundred and fifty dollars. He is also guilty of a misdemeanor; and, upon conviction thereof, shall be punished by fine, not exceeding one thousand dollars, or by imprisonment, not exceeding six months, or by both, in the discretion of the court.¹

Where the return to a writ of *habeas corpus* states that the prisoner is so sick or infirm, that the production of him would endanger his life or health, and the return is otherwise sufficient, the court or judge, if satisfied of the truth of that statement, must decide upon the return, and dispose of the matter, as if a writ of *certiorari* had been issued.²

The general provisions of the statute applicable to the writ of *habeas corpus*, are likewise applicable to the writ of *certiorari*.

Appeal.

An appeal may be taken from an order refusing to grant a writ of *habeas corpus*, or writ of *certiorari*, as prescribed in this article, or from a final order, made upon the return of such a writ, to discharge or remand a prisoner, or to dismiss the proceedings. Where a final order is made to discharge a prisoner upon his giving bail, an appeal therefrom may be taken, before bail is given; but where the appeal is taken by the people, the discharge of the prisoner upon bail shall not be stayed thereby. An appeal does not lie, from an order of the court or judge, before which or whom the writ is made returnable, except as prescribed in this section.³

¹ Code Civ. Pro., § 2051.

² Code Civ. Pro., § 2052.

³ Code Civ. Pro., § 2058; 2 N. Y. St. Rep., 676; 17 Abb. Pr., 326, note; 16 Barb., 362; 6 Abb. N. C., 43; see Code Civ. Pro., §§ 1356, 1361, 2121, 190, subd. 3.

An appeal from a final order, discharging a prisoner committed upon a criminal accusation, or from the affirmance of such an order, may be taken, in the name of the people, by the attorney-general or the district attorney.¹

Where a prisoner, who stands charged, upon a criminal accusation, with a bailable offense, has perfected, or intends to take, an appeal from a final order dismissing the proceedings, remanding him, or otherwise refusing to discharge him, made as prescribed in this article, the court or judge upon his application, either before or after the final order, must, upon such notice to the district attorney as the court or judge thinks proper, make an order, fixing the sum in which the applicant shall be admitted to bail, pending the appeal; and thereupon, when his appeal is perfected, he must be admitted to bail accordingly.²

The recognizance for that purpose must be conditioned, that the prisoner will appear at a general term of the appellate court to be held at a time and place designated in the order, and abide by and perform the judgment or order of the appellate court. It must be taken and approved by a justice of the Supreme Court, or by the court or judge from whose order the appeal is taken, or by the county judge of the county in which the order was made, or, in the city of New York, by a judge of the court of common pleas for that city and county. In all other respects, the proceedings are the same as prescribed in this article, where it appears, upon the return of a writ of *certiorari*, that the prisoner is entitled to be admitted to bail.³

Where a prisoner, who stands charged with an offense, specified in the last section, has perfected an appeal to the court of appeals, from a final order of the Supreme Court, or of a superior city court, affirming an order re-

¹ Code Civ. Pro., § 2059.

² Code Civ. Pro., § 2060.

³ Code Civ. Pro., § 2061.

fusing his discharge, or reversing an order granting his discharge, the court, from whose order the appeal is taken, or a judge thereof, must, upon his application, admit him to bail, as prescribed in the last section, except that the recognizance must be conditioned to appear at a general term of the court from which the appeal is taken, to abide by and perform its judgment or order, made after the determination of the appeal.¹

Where the sum, in which a prisoner shall be admitted to bail, has been fixed, as prescribed in either of the last two sections, he must remain in the custody of the sheriff of the county in which he then is, until he is admitted to bail, as therein prescribed; or if he does not give the requisite bail, until the time to appeal has expired, or the appeal is disposed of, and the further direction of the court made thereupon.²

Where no order or other direction of the court, relating to the disposition of the prisoner, is made at the term specified in a recognizance, given as prescribed in section 2061 or section 2062 of this act, the matter is deemed adjourned, without an order to that effect, to the next general term of the same court; or, in the Supreme Court, to the next general term thereof to be held in the same department; and thereafter to each successive general term, until such an order or direction is made. The prisoner is bound to attend at each successive general term; and the recognizance is valid for his attendance accordingly, without any notice or other formal proceedings.³

Except as otherwise expressly prescribed by statute, the provisions of this article apply to and regulate the proceedings upon every common law or statutory writ of *habeas corpus*, as far as they are applicable; and the authority of a court or judge to grant such a writ, or to proceed thereupon, by statute or the common law, must

¹ Code Civ. Pro., § 2062.

² Code Civ. Pro., § 2063.

³ Code Civ. Pro., § 2064.

be exercised in conformity to this article, in any case therein provided for.¹

The writ of Habeas Corpus to testify.

This writ is for the purpose of obtaining the testimony of persons under arrest; it is entirely different in its functions from the writ of *habeas corpus*, to inquire into the cause of detention of a prisoner.

A court of record, other than a justices' court of a city, or a judge of such a court, or a justice of the Supreme Court, has power, upon the application of a party to an action or special proceeding, civil or criminal, pending therein, to issue a writ of *habeas corpus*, for the purpose of bringing before the court a prisoner detained in a jail or prison within the State, to testify as a witness in the action or special proceeding, in behalf of the applicant.² A prisoner may be brought up on the writ, to testify on his own application for discharge.³

Such a writ may also be issued by a justice of the Supreme Court, upon the application of a party to a special proceeding, civil or criminal, pending before any officer or body, authorized to examine a witness therein. In a case specified in this section, the writ may also be issued by a judge of a superior city court, a county judge or a special county judge, residing within the county where the officer resides, before whom, or the court or other body sits, in or before which the special proceeding is pending.⁴

Such a writ may also be issued by a justice of the Supreme court, upon the application of a party to an action pending before a justice of the peace, or in a justices' court of a city, or a district court of the city of New York, to bring before the justice or court, to be examined as a witness, a prisoner confined in the jail of the

¹ Code Civ. Pro., § 2066; 66 How., 291; 60 N. Y., 559; 1 Duer, 709.

² Code Civ. Pro., § 2008.

³ 5 Cow., 178.

⁴ Code Civ. Pro., § 2009.

county where the action is to be tried, or an adjoining county. In a case specified in this section, the writ may also be issued by a judge of a superior city court, a county judge, or a special county judge, residing within the county where the justice resides, or the court is located, or the prisoner is confined, as the case may be.¹

Prisoner sentenced to death or for felony.—A writ shall not be issued, by virtue of either of the last three sections, to bring up a prisoner sentenced to death. Nor shall it be issued to bring up a prisoner confined under any other sentence for a felony; except where the application is made in behalf of the people to bring him up as a witness on the trial of an indictment, and then only by and in the discretion of a justice of the Supreme Court or a judge of a superior city court, upon such notice to the district attorney of the county wherein the prisoner was convicted, and upon such terms and conditions, and under such regulations as the judge prescribes.²

An application for a writ, made as prescribed in either of the foregoing sections of this article, must be verified by affidavit, and must state:

1. The title and nature of the action or special proceeding, in regard to which the testimony of the prisoner is desired; and the court, or body, in or before which, or the officer before whom, it is pending.

2. That the testimony of the prisoner is material and necessary to the applicant, on the trial of the action, or the hearing of the special proceeding, as he is advised by counsel and verily believes.

3. The place of confinement of the prisoner.

4. Whether the prisoner is or is not confined under a sentence for a felony.

But where the attorney-general or district attorney makes the application, he need not swear to advice of counsel.³

¹ Code Civ. Pro., § 2010.

² Code Civ. Pro., § 2011.

³ Code Civ. Pro., § 2012.

The return to a writ, issued as prescribed in this article, must state for what cause the prisoner is held; and if it appears therefrom, that he is held by virtue of a mandate in a civil action or special proceeding, or by virtue of a commitment upon a criminal charge, he must, after having testified, be remanded, and again committed to the prison, from which he was taken.¹

Any officer to whom a writ, issued as prescribed in this article, is delivered, must obey the same, according to the exigency thereof, and make a return thereto accordingly. If he refuses or neglects so to do, he forfeits, to the people, if the writ was issued upon the application of the attorney-general or a district attorney, or, in any other case, to the party on whose application the writ was issued, the sum of five hundred dollars. But where the prisoner is confined under a sentence to death, a return to that effect is a sufficient obedience to the writ, without producing him.²

A sheriff is protected by the writ if it was issued a by a court or officer of competent jurisdiction, and the writ is not void on its face, even if were issued erroneously.³ When a sheriff, having a prisoner in custody for contempt, receive a *habeas* to produce him to testify at an office in the place where the jail is situate, *held*, that he is not authorized to permit him to go to any other place than that named in the writ, or to remain there longer than the magistrate.⁴

¹ Code Civ. Pro., § 2018; 15 Abb. N. S., 33.

² Code Civ. Pro., § 2014.

³ 5 Cow., 176; 8 Barb., 37.

⁴ 10 Paige, 606; see 18 Johns., 43.

CHAPTER III.

CERTIORARI.

The office of the writ of *certiorari* is to correct errors of a judicial character of inferior courts, and errors in the determination of special tribunals, commissioners, magistrates and officers exercising judicial powers affecting the property or rights of a citizen, and who act in a summary way, or in a new way not known to the common law, and also the proceedings of municipal corporations in certain cases.

The Supreme Court has jurisdiction to award a *certiorari*, even where the law has provided some other tribunal to hear and determine the questions, if the jurisdiction is not taken away by express words.

The acts of officers of municipal corporations, if plainly judicial in their character, may be reviewed on *certiorari*.¹ So, the determination of an appeal from the commissioners of highways.² So, the decision of an officer to whom an application for a *habeas corpus* is made, that he has no jurisdiction to grant it.³ So, where an officer discharged a complaint under the act to abolish imprisonment for debt, on the ground of want of proof.⁴ So, in proceedings in insolvency⁵ and court martial.⁶ So as to the determination of canal appraisers, where it is alleged they acted without notice.⁷ So as to a municipal assessment for a local improvement where there has been

¹ 2 Hill, 14; 5 Barb., 43.

² 2 Cal., 179; 15 Johns., 137.

³ 16 Barb., 302.

⁴ 3 Johns. Cas., 141.

⁵ 1 Wend., 90.

⁶ 15 Wend., 451.

⁷ 1 Wend., 288.

an essential departure from the statute in the principal of assessment.¹

The order of a board of health, adjudging a certain business a nuisance, is a legislative act, and cannot be reviewed by *certiorari*.² A void order of commissioners of highways may be treated as voidable, and the party may bring a *certiorari* to quash it.³ In order to warrant interference with a municipal corporation by *certiorari*, the act must be plainly judicial. A *certiorari* does not lie to review a corporate resolution appropriating land for a public square.⁴ In general, the court will not allow this writ where taxes or award of damages are in question, which affect a considerable number of persons.⁵

The granting of a *certiorari* is in the discretion of the court, and it is often denied where the power to issue it is unquestionable, and where there is apparent error in the proceedings below.⁶ It is said in a recent case in the Court of Appeals, "An order which simply quashes a common law *certiorari*, has often been held not appealable to this Court, because the issuing of the writ rests in the discretion of the court, and consequently it can, in its discretion, recall or quash the writ without passing on the validity of the proceedings sought to be reviewed.⁷ Before allowing or acting upon the writ the court should be satisfied that it is essential to prevent some substantial injury to the applicant, and that the mere object aimed at by him would not, if accomplished, be productive of great inconvenience or injustice.⁸ A *certiorari* should not issue where the party has another adequate

¹ 21 Barb., 656; 15 Wend., 255.

² 20 How. Pr., 458.

³ 22 Wend., 132.

⁴ 2 Hill, 14.

⁵ 3 Abb. Pr., 232.

⁶ 19 N. Y., 531; 102 N. Y., 642.

⁷ 3 N. Y. St Rep., 610; 103 N. Y., 370; see, also, 26 N. Y., 437; 21 N. Y., 656; 83 N. Y., 341; 52 N. Y., 445; 45 How., 289.

⁸ 5 Barb., 48.

remedy;'¹ nor until the case is finally adjudicated below.'² It seems that the writ will not be granted after two years,' and in some cases the lapse of a shorter time may be ground for refusing the allowance.'

Whenever the right to review by *certiorari* is given by statute, the writ issues as a matter of course, as where it is to review a report of commissioners in a New York street case,' or to review an indictment for forcible entry and detainer.'³ In other cases it can only issue by order of the court. To authorize the writ there must be a determination by a body or officer and a person aggrieved by it.'

The following quotation is made from the note of the revisers of our Code in their report of the article on the writ of *certiorari*, to the legislature: "In many special statutes of the State, a *certiorari* is expressly granted in a particular case; and sometimes the effect of the writ, or the proceedings thereunder, are regulated by the statute which grants it. But we have no general statute, prescribing the cases where a common law *certiorari* may issue; and the former statutes contained only a very few and scanty general provisions, relating to the powers of the court, or the mode of procedure thereupon, which are the same, with respect to the common law and the statutory writ, except where other provision for the latter is expressly made. These subjects were left to be regulated by the decisions of the courts; and, as the writ has been a favorite remedy, our books of reports contain an immense number of adjudications thereupon. The following principles may be deduced from the authorities, as those which regulate the cases where the common law writ may issue, at least in civil cases, to which, by section 2148, this article is confined:

¹ 1 Hill., 195.

² 20 Johns., 80.

³ 25 Wend., 693; 2 Hill, 9.

⁴ 7 How. Pr., 166.

⁵ 2 Hill, 14.

⁶ 6 Johns., 334.

⁷ 32 N. Y. St. Rep., 548.

1. A court of general jurisdiction may, in its discretion, upon the application of any party to (or, in certain illy defined cases, a person interested in), a suit or proceeding before any inferior court, tribunal, board, officer or other person, vested by law with an authority judicial in its nature (*Easton v. Calendar*, 11 Wend., 90; *Matter of Mt. Morris Square*, 2 Hill, 14; *People v. Van Alstyne*, 32 Barb., 131; *People v. Board of Health*, 33 id., 334; S. C., 12 Abb. Pr., 88; *People v. Supervisors of Livingston*, 43 Barb., 232; *People v. Hadley*, 14 Hun, 183; *People v. Walter*, 68 N. Y., 403); and perhaps, also, where the power is ministerial in its nature, but necessarily connected with judicial authority (*People v. Hill*, 7 Alb. L. J., 220; *Matter of Nichols*, 6 Abb. N. C., 474); issue a writ of *certiorari* to review any final determination, judicial in its nature, made in such proceeding, by such authority; or under color thereof, (*Fitch v. Kirkland Commissioners*, 22 Wend., 132; *People v. Suffolk Judges*, 24 id., 249); where the applicant cannot be adequately relieved in any other way. *People v. Supervisors of Queens*, 1 Hill, 195; *People v. Board of Health*, 33 Barb., 344; 12 Abb. Pr., 88; *People v. Overseers, etc.*, 44 Barb., 467; *Leary's Case*, 6 Abb. N. C., 43; *People v. Nichols*, 18 Hun, 530; *People v. Village of Nelliston*, 18 id., 175; *People v. Mayor*, 19 id., 441; *People v. Mayor*, 20 id., 73; *People v. Covill*, 20 id., 460.

2. A court of general jurisdiction may, in its discretion, upon the application of any party to a proceeding before it, or of its own motion, issue the writ, to procure, from any such inferior authority, information which the latter has, and which is necessary, or convenient, for the purposes of justice, in the course of the proceedings in the higher court. 2 R. S., 599, Part 3, ch. 9, tit. 3, § 45 (2 Edm. 621); *Graham v. People*, 6 Lans., 149; *Kanouse v. Martin*, 3 Sand., S. C. R., 593; *People v. Cancemi*, 7 Abb. Pr., 271; *Sweet v. Overseers of Clinton*, 3 Johns., 23.

3. It has been held, in some cases, that the common

law remedy, as thus defined, is not taken away by a provision of the statute that the determination of the inferior tribunal is final. *Leroy v. Mayor, etc.*, 20 Johns, 430; *Ex parte Mayor, etc.*, 23 Wend, 277; *People v. Freeman*, 3 Lans., 148. But the Court of Appeals has held the other way. *People v. Betts*, 55 N. Y., 600. It seems, however, that the writ is not taken away by a provision in a statute giving a special writ. *Comstock v. Porter*, 5 Wend., 98; *Kellogg v. Church*, 3 Denio, 228. In the latter case, the two remedies are concurrent.

These rulings, as well as the mode of proceeding under the common law writ, remained substantially unaffected by the Code of Procedure. The subsequent statutes, relating to appeals in special proceedings, although doubtless applicable to determinations made upon *certiorari*, did not, it seems, limit the cases where a *certiorari* might be resorted to. But it is quite clear that the policy of those statutes required that the remedy by appeal should be extended to all cases where that mode of review can be safely pursued; and that the remedy by *certiorari* should be limited accordingly. This Code contains the necessary enactments for the purpose of carrying out that policy, as far as its framers found it practicable so to do. Sections 1356 and 1357 extend the right of appeal to every case where the determination of a court of record, or a judge thereof, made in a special proceeding, is to be reviewed. These constitute a very large proportion of the cases in which a *certiorari* is now the proper mode of review. But it was found impossible, as stated in the preliminary note to the title which contains those sections (tit. 5 of ch. 12), to extend the remedy by appeal to the review of the determinations of all the various officers, boards, etc., whose decisions may now be reviewed by *certiorari*, without encountering the risk of doing more harm than good by the change; and the framers of this Code were therefore compelled to leave such cases to be regulated in this article. In order to confine the remedy by *certiorari* to the latter cases, and

to those where it is expressly conferred by statute, it is only necessary to provide, as has been done in section 2122, that a *certiorari* cannot issue except by special provision of law, in any case where an adequate review can be obtained by appeal.

Notwithstanding that the field of the writ of *certiorari* will be considerably narrowed by these changes, it is necessary that the faults and imperfections of the former rules of law relating thereto should be removed, as far as practicable; for important cases will often occur where a *certiorari* is the only mode of review. Accordingly, this article regulates various matters relating to the jurisdiction and the powers of the courts, as well as the mode of procedure, concerning which the authorities are either obscure, contradictory, or unsatisfactory. But care has been taken to provide, by an express clause in section 2147, that the new enactment shall not affect any case where a different provision is made by any of the statutes which this revision will leave in force. The provisions of this article, defining the jurisdiction of the court to issue a *certiorari*, will therefore be confined to a common law *certiorari*; while those relating to the proceedings, and to the powers of the court after the writ is issued, will apply only to a common law *certiorari*, and to matters arising under a statutory *certiorari*, respecting which the statute authorizing the writ makes no special provision in the particular case."

This statement is, perhaps, as full as can be made, concisely, of the principles regulating the issuing of the writ.

The writ of *certiorari* regulated in this article, except the writ specified in section 2124 of this act, is issued to review the determination of a body or officer. It can be issued in one of the following cases only:

1. Where the right to the writ is expressly conferred, or the issue thereof is expressly authorized by a statute.
2. Where the writ may be issued at common law by a

court of general jurisdiction, and the right to the writ, or the power of the court to issue it, is not expressly taken away by a statute.¹

A writ of *certiorari* cannot be issued to review a determination made, after this article takes effect, in a civil action or special proceeding, by a court of record, or a judge of a court of record.²

Except as otherwise expressly prescribed by a statute, a writ of *certiorari* cannot be issued in either of the following cases:

1. To review a determination which does not finally determine the rights of the parties with respect to the matter to be reviewed.^a

2. Where the determination can be adequately reviewed by an appeal to a court, or to some other body or officer.^b

3. Where the body or officer making the determination is expressly authorized by statute to rehear the matter, upon the relator's application, unless the determination to be reviewed was made upon a rehearing, or the time within which the relator can procure a rehearing has elapsed.^c

A writ of *certiorari* can be issued only out of the Supreme Court, or a superior city court; except in a case where another court is expressly authorized by statute to issue it.^d

Any court of record, exercising jurisdiction of an appellate nature, may issue a writ of *certiorari*, requiring the body or officer whose proceedings are under review, to make a return to the court issuing the writ, at a time and place fixed by the court, and designated in the writ, for the purpose of supplying any diminution,

¹ Code Civ. Pro., § 2 20.

² Code Civ. Pro., § 2121.

³ Code Civ. Pro., § 2122.

^a 20 Johns., 80; 4 Wend., 218; 11 Abb. Pr., 398; 3 Hun, 549.

^b 2 Wend., 287; 11 Id., 90.

^c 37 Barb., 126.

^d Code Civ. Pro., § 2123.

variance, or other defect, in the record or other papers, before the court issuing the writ, in any case where justice requires that the defect should be supplied, and adequate relief cannot be obtained by means of an order.¹

Subject to the provisions of the next section, a writ of *certiorari* to review a determination must be granted and served, within four calendar months after the determination to be reviewed becomes final and binding, upon the relator, or the person whom he represents, either in law or in fact.²

Previous to the Code, there was no limit fixed at common law, the practice being analogous to the limitations of writs of error,³ and it was held that an unreasonable delay in applying for the writ was a good ground for refusal of the writ.⁴

The court, at a general term thereof, may grant the writ, at any time within twenty months after the expiration of the time limited in the last section, where the relator, or the person whom he represents, was, at the time when the determination to be reviewed became final and binding upon him, either

1. Within the age of twenty-one years; or
2. Insane; or
3. Imprisoned on a criminal charge, or in execution upon conviction of a criminal offense, for a term less than for life.⁵

Applying for the writ.

An application for the writ must be made by or in behalf of a person aggrieved by the determination to be reviewed; must be founded upon an affidavit, or a verified petition, which may be accompanied by other written proof; and must show a proper case for the issuing of the writ. It can be granted only at a general or

¹ Code Civ. Pro., § 2124.

² Code Civ. Pro., § 2125.

³ 25 Wend., 693; 2 Hill, 9.

⁴ 77 N. Y., 605.

⁵ Code Civ. Pro., § 2126.

special term of the court; and the granting or refusal thereof is discretionary with the court.¹

A *certiorari* is a judicial writ; it issues out of the Supreme or Superior Court; it must be sealed, and should be directed to the judge or officer, or other party complained of, reciting the proceedings, and commanding the judge or officer to certify and return the record or proceedings to the Supreme Court on a specified day. It is tested and signed like an ordinary writ; but it should be indorsed with a copy of the order allowing the writ, or a certificate that the same has been duly allowed.² It is sufficient if a copy of the order allowing the writ is served with it. A party who has no interest cannot prosecute the writ of *certiorari*,³ and the writ must show that some person is aggrieved, and recite his complaint.⁴ It cannot be prosecuted at the suit of an individual, but must be at the suit of the people upon the relation of an individual.⁵ If the writ is issued upon the relation of public officers, the names of the officers, with the title of the office, should be given, as in the case of the overseers of the poor, the individual names of the overseers, in addition to the name of the office, should be given.⁶ If the writ is to review the proceedings of a municipal corporation, it should be directed to the corporation by its corporate name.⁷ So, if it is intended to bring up the proceedings of the New York police board for review, the writ should be addressed to the police board without naming the commissioners.⁸ If it is intended to review the proceedings of officers, the individuals should be named, with the style of their office.

¹ Code Civ. Pro., § 2127.

² 19 Wend., 640.

³ 12 Wend., 234.

⁴ 23 Wend., 277.

⁵ 16 Johns., 49.

⁶ 2 How. Pr., 187.

⁷ 6 Wend., 564; 23 Wend., 277.

⁸ 6 Abb. Pr., 151.

Formerly the application was founded upon an affidavit.¹ Under Laws of 1880, chapter 269, a petition to review the illegality of an assessment may be presented by a number of petitioners and verified by one.² Cause must be shown for a *certiorari*, in all cases where it is to review the proceedings of an inferior jurisdiction for error, except when the writ is sued out by the people.³ Before allowing or acting upon the writ, the court should to be satisfied that it is essential to prevent some substantial injury to the applicant; and that the object aimed at by him would not, if accomplished, be productive of great inconvenience. It should seldom, if ever, be allowed to enable a party to take advantage of mere technical objection.⁴

The writ of *certiorari*, when sued for the purpose of reviewing the acts and decisions of special jurisdictions created by statute, and which do not proceed according to the course of common law, is not a matter of right, but is granted only upon application to the court and special cause shown.⁵

The Court of Appeals in a late case said: "An order of general term quashing a writ of *certiorari* is in the discretion of the court, and is not reviewable here, except in a case where the general term refrains from exercising its discretion."⁶ The affidavit sued upon application for the writ should not be entitled.⁷

Until provision is made, in the general rules of practice, for requiring, or dispensing with notice of the application for the writ, the court, to which the application for the writ is made, may, in its discretion, require or dispense with notice. A notice, when it is necessary, must be served, with copies of the papers upon which

¹ 7 Cow., 537.

² 41 Hun, 307.

³ 6 Cow., 396.

⁴ 5 Barb., 43.

⁵ 15 Wend., 198.

⁶ 102 N. Y., 680.

⁷ 2 Johns., 371; 2 Cow., 499.

the application is to be made, upon the body or officer, whose determination is to be reviewed, or upon such other person as the court directs, as prescribed in this article for the service of a writ of *certiorari*. The service must be made at least eight days before the application, unless the court, by an order to show cause, prescribes a shorter time. Where notice is given, the person served may produce affidavits or other written proofs, upon the merits, in opposition to the application.¹

It was held, previous to codification, that a common law *certiorari* might be granted upon an *ex parte* application.² Under the former statutes, it was not necessary to serve the application.³ The fourth sentence of the section settles a disputed question of practice.⁴ The usual form of notice is an order to show cause, and where the writ is desired to review municipal assessments, should always be obtained.⁵ Under the statute of 1880, the practice is to dispense with the notice.⁶

The writ must be directed to the body or officer whose determination is to be reviewed; or to any other person having the custody of the record or other papers to be certified; or to both, if necessary. Where it is brought to review the determination of a board or body, other than a court, if an action would lie against the board or body, in its associate or official name, it must be directed to the board or body, by that name; otherwise, it must be directed to the members thereof, by their names.⁷

How served.

A writ of *certiorari* must be served as follows, except where different directions, respecting the mode of service thereof, are given by the court granting it:

¹ Code Civ. Pro., § 2128.

² 17 Abb. Pr., 112.

³ 16 Hun, 461.

⁴ 1 Hill, 195; 2 Hill, 398; *contra*, 9 Wend., 434.

⁵ 21 Barb., 656; 23 Wend., 277.

⁶ 85 N. Y., 628.

⁷ Code Civ. Pro., § 2129.

1. Where it is directed to a person or persons by name, or by his or their official title or titles, or to a municipal corporation, it must be served upon each officer or other person to whom it is so directed, or upon the corporation, in the same manner as a summons in an action brought in the Supreme Court, except as prescribed in the next two subdivisions of this section.

2. Where it is directed to a court, or to the judges of a court, having a clerk appointed pursuant to law, service upon the court, or the judges thereof, may be made by filing the writ with the clerk.

3. Where it is to be served upon any other board or body, or upon the members thereof, it may be served as prescribed in section 2071 of this act, for service, upon a like board or body, of an alternative writ of mandamus.¹

Motion to quash or supersede the writ.—If the writ has been irregularly or prematurely allowed, the court will, on motion, direct a *supersedeas* of the writ to be entered, as where it was made to appear that the writ was allowed before the proceedings removed by it were completely terminated.² This motion should be made before the return. If the writ was granted in an improper case, the defendant may move to quash it, and the court will quash it even after a return and hearing on the merits.³ It has been said that a motion to quash the writ cannot be sustained till after the return has been made,⁴ but no good reason is apparent why it may not be made at any time.⁵ The motion papers should be entitled with the name of the defendant in error, *Ads. The People ex rel., etc.*, the plaintiff in error.⁶

Effect of writ as to stay.

Except as prescribed in this section, a writ of *certiorari* does not stay the execution of the determination

¹ Code Civ. Pro., § 2130.

² 5 Abb. Pr., 194.

³ 2 Hill, 9; 1 How. Pr., 141.

⁴ 1 Cow., 48.

⁵ 5 How. Pr., 378.

⁶ 2 How. Pr., 70.

to be reviewed, or affect the power of the body or officer, to which or to whom it is addressed. The court, which grants the writ, may, in its discretion, and upon such terms, as to security or otherwise, as justice requires, direct, by a clause in the writ, or by a separate order, that the execution of the determination be stayed, pending the *certiorari*, and until the further direction of the court. A bond, undertaking, or other security, given to procure such a stay, is valid and effectual, according to its terms, in favor of a person beneficially interested in upholding the determination to be reviewed, who is admitted as a party to the special proceeding, as prescribed in section 2137 of this act.¹

“The question whether a *certiorari* operates, *per se*, as a stay, was, when this Code was enacted, still surrounded with much obscurity. *Blanchard v. Myers*, 9 Johns., 66; *Ex parte Sanders*, 4 Cow., 544; *Patchin v. Mayor, etc., of Brooklyn*, 13 Wend., 654; *Payfer v. Bis- sel*, 3 Hill, 239; *Conover's Case*, 5 Abb. Pr., 182; S. C., 26 Barb., 429. This section appears, upon the whole, to be the safest provision to settle the question.”

The return.

A writ of *certiorari* must be made returnable within twenty days after the service thereof, at the office of the clerk of the court. If it was issued from the Supreme Court, it must be made returnable at the office of the clerk of the county, designated therein, wherein the determination to be reviewed was made; and if the county, designated in the writ, is not the proper county, the court, upon motion, may amend the writ accordingly. Thereupon all papers on file must be transferred to the clerk of the county, where the writ is made returnable by the amendment.²

After a writ of *certiorari* has been issued, the time to make a return thereto may be enlarged, or any other

¹ Code Civ. Pro., § 2131.

² Code Civ. Pro., § 2132.

order may be made, or proceeding taken, in the cause, in relation to any matter not provided for in this article, as a similar proceeding may be taken in an action, brought in the same court, and triable in the county where the writ is returnable.¹

The clerk, with whom a writ of *certiorari* is filed, and each person upon whom a writ of *certiorari* is served, as prescribed in section 2130 of this act, must make and annex to the writ, or to the copy thereof served upon him, a return, with a transcript annexed, and certified by him, of the record or proceedings, and a statement of the other matters, specified in and required by the writ. The return must be filed in the office where the writ is returnable, according to the command thereof.²

The writ is obeyed by returning and certifying the record of the proceedings of the inferior tribunal, and where there is technically no record, the written proceedings and orders, or a history of the proceedings, and the written orders, which are in the nature of records, are to be certified, and filed in the clerk's office of the county where the order allowing the writ is entered.³ Nothing but the record or history of the proceedings need be returned;⁴ but it should be shown that the tribunal had jurisdiction, and enough of the facts or evidence before the inferior court should be returned to enable the court to determine upon a point of jurisdiction or other question of law arising in the course of the proceedings.⁵ To review proceedings to open highways, the return must give the record only.⁶ On a *certiorari* to remove proceedings by a landlord to recover possession of land, the court will require the return of so much of the evidence as is necessary to show that the relation of

¹ Code Civ. Pro., § 2133.

² Code Civ. Pro., § 2134.

³ 25 Wend., 168.

⁴ 6 Wend., 564.

⁵ 24 N. Y., 403; 15 Wend., 452.

⁶ 32 N. Y. St. Rep., 353.

landlord and tenant existed between the parties.¹ So, on *certiorari* to the sessions, in a bastardy case, the court may order the sessions to return such facts as are necessary to review the law of the case.² So, on a *certiorari* to the general sessions to remove their proceedings, on an order of settlement, the sessions will be compelled to return the evidence and points of law.³ In the return of a regimental court martial to a *certiorari* to review their proceedings, in imposing a fine, the facts or evidence are not to be returned any further than is necessary to enable the court to determine upon a point of jurisdiction or other question of law arising in the course of the proceeding.⁴

Upon a common law *certiorari* to the referees in highway cases, to review their proceedings on an appeal from the highway commissioners, all facts and evidence bearing on the question of jurisdiction must be returned, including that in relation to the character and termini of the proposed road, and that which relates to the validity of the application to the commissioners; but that which tends simply to show the public utility of the proposed road, need not be stated.⁵

Inferior magistrates, when required by a common law writ of *certiorari*, to return their proceedings, must show, affirmatively, that they had authority to act; and where their authority and jurisdiction depend upon a fact to be proved before themselves, and such fact be disputed, the magistrate must certify the proofs given in relation to it, for the purpose of enabling the higher court to determine whether the fact is established.⁶ It is the duty of the court below to return enough of the proceedings to show, not only that they had jurisdiction of the subject-matter of the inquiry and of the person, but also

¹ 1 Seld., 383.

² 3 Johns., 23.

³ 2 Cow., 575.

⁴ 15 Wend., 451.

⁵ 32 Barb., 131.

⁶ 5 N. Y., 568; 24 N. Y., 397.

that some proof was made which had at least a tendency to establish the material allegations in issue.¹ The return cannot be contradicted by an assignment of errors; it must be taken as conclusive, and acted upon as true. If false, the remedy is by action.²

If the writ require unnecessary evidence to be returned, such requisition may be disregarded.³ If the return contains any thing not proper, it will be disregarded *pro tanto*.⁴ The court will disregard matter in the return not called for by the writ, and will not intend that proceedings not returned were irregular.⁵ But the necessary evidence to make out a fact essential to the jurisdiction of the officer will not be assumed.⁶ If the writ is directed to an officer, and he goes out of office before making his return, he may, notwithstanding, make a valid return of what was done by him while in office.⁷ If the person or officer to whom the writ is directed dies before any return is made, the court will hear and decide the case on motion and affidavit.⁸

If a return is defective, the court may direct a further return. An omission to make a return, as required by a writ of *certiorari*, or by an order for a further return, may be punished as a contempt of the court. But a judge or clerk shall not be thus punished, unless the relator, before the time when the return is required, pays him, for his return, the sum of two dollars, and, in addition, ten cents for each folio of the copies of papers required to be returned.⁹

The return to a writ of *certiorari* must be taken as conclusive and acted upon as true; if false in fact, the

¹ 15 Barb., 286.

² 20 Wend., 625.

³ 23 Wend., 277.

⁴ 2 Hill, 9.

⁵ 2 Cai., 179.

⁶ 7 N. Y., 128.

⁷ 6 How. Pr., 175.

⁸ 10 Johns., 304; 1 Cow., 168.

⁹ Code Civ. Pro., § 2135.

remedy is by action for a false return; if insufficient in form, by compelling a further and more specific return.¹ A return is required only to the matters specified in the writ.² Where a common law *certiorari* issued against a corporation who neglected to appear and make a return, it was held that a writ of sequestration ought not to issue until a *distingue* should be tried.³

A writ of *certiorari* may be issued to, and a return to a writ of *certiorari* may be made by, an officer whose term of office has expired. Such an officer may be punished for a failure to make a return to the writ as required by an order for that purpose.⁴

Upon the application of a person specially and beneficially interested in upholding the determination to be reviewed, the court may, in its discretion, admit him as a party defendant in the special proceeding, upon such terms as justice requires. And a general term of the court, at which the case is noticed for hearing, and is placed upon the calendar, may, in a proper case, direct that notice of the pendency of the special proceeding be given to any person, in such a manner as it thinks proper; and may suspend the hearing until notice is given accordingly.⁵

Hearing.

The cause must be heard at a general term of the court. In the Supreme Court, it must be heard at a general term, held within the judicial department embracing the county where the writ was returnable. Either party may notice it for hearing, at any time after the return is complete. Except as prescribed in the next section, it must be heard upon the writ and return, and the papers upon which the writ was granted.⁶

¹ 73 N. Y., 437.

² 38 Hun, 43.

³ 5 How., 314.

⁴ Code Civ. Pro., § 2136; 15 How. Pr., 470; 6 How. Pr., 175, 223; 65 Barb., 170.

⁵ Code Civ. Pro., § 2137.

⁶ Code Civ. Pro., § 2138.

Under the former statute, a *certiorari* was ordinarily returned at general term.¹ The rule requiring eight days' notice is binding, only so far as consistent with the Code.² Where the relator fails to traverse or deny the sufficiency of the return, the facts alleged must be taken as conclusive.³

How determined.

If the officer or other person, whose duty it is to make a return, dies, absconds, removes from the State, or becomes insane, after the writ is issued, and before making a return, or after making an insufficient return; and it appears that there is no other officer or person, from whom a sufficient return can be procured by means of a new *certiorari*; the court may, in its discretion, permit affidavits, or other written proofs, relating to the matters not sufficiently returned, to be produced, and may hear the cause accordingly. The court may also, in its discretion, permit either party to produce affidavits, or other written proofs, relating to any alleged error of fact, or any other question of fact, which is essential to the jurisdiction of the body or officer, to make the determination to be reviewed, where the facts, in relation thereto, are not sufficiently stated in the return, and the court is satisfied that they cannot be made to appear, by means of an order for a further return.⁴

The questions, involving the merits, to be determined by the court upon the hearing, are the following, only:

1. Whether the body or officer had jurisdiction of the subject-matter of the determination under review.
2. Whether the authority, conferred upon the body or officer, in relation to that subject, has been pursued in the mode required by law, in order to authorize it or him to make the determination.
3. Whether, in making the determination, any rule of

¹ 35 Barb., 444; 13 Abb. Pr., 405; 16 Abb. Pr., 337.

² 58 How., 200.

³ 2 N. Y. St. Rep., 110.

⁴ Code Civ. Pro., § 2139; 10 Johns., 304; 1 Cow., 168; 12 Wend., 266; 21 N. Y., 82.

law, affecting the rights of the parties thereto, has been violated, to the prejudice of the relator.

4. Whether there was any competent proof of all the facts, necessary to be proved, in order to authorize the making of the determination.

5. If there was such proof, whether there was, upon all the evidence, such a preponderance of proof, against the existence of any of those facts, that the verdict of a jury, affirming the existence thereof, rendered in an action in the supreme court, triable by a jury, would be set aside by the court, as against the weight of evidence.¹

We quote from the note of the codifiers, in their report:

“The questions, which this section aims to settle, have been the subject of a great number of adjudications within the State, many of which are obscure and contradictory. See 2 Abbott’s Digest, new ed., tit. Certiorari, pp. 11–13, art. 118–139. As late as 1866, it was forcibly said by MORGAN, J.: ‘The decisions of the courts, in relation to the office of a common-law *certiorari*, are so conflicting, that it is quite impossible to say that any settled rule has ever been established in this State, which has not been subsequently departed from.’ *Baldwin v. City of Buffalo*, 35 N. Y., 380. Since then, these questions have been again before the Court of Appeals in various cases, in one of which, *People v. Smith*, 45 N. Y., 772, decided in 1871, GROVER, J., lays down the following rule: ‘Whatever may have been the conflict of authority, heretofore, upon the question, whether, upon a common-law *certiorari*, the court can inquire into anything beyond the jurisdiction of the tribunal over the parties and subject-matter, it must now be regarded as settled, in this State, that it is the duty of the court, in addition thereto, to examine the evidence, and determine whether there was any competent proof of the facts necessary to authorize the adjudication made, and whether, in making it, any rule of law affecting the

¹ Code Civ. Pro., § 2140.

rights of the parties has been violated.' Pp. 776, 777. If so much certainty has, at last, been attained, it seems to be desirable, to prevent the possibility of reopening the question thus decided, and to declare definitely that the cases holding the other way are obsolete, by incorporating these principles into the statute. Subd. 1 to 4 of the foregoing section embody them correctly, it is believed; the changes of language being such only as appeared to be necessary in order to attain the precision required in a declaratory statute. See, also, *People v. Sanders*, 3 Hun, 16; S. C., *sub. nom.*, *People v. Court of Special Sessions*, 5 N. Y., Sup. Ct. (T. & C.), 260; *People v. Betts*, 55 N. Y., 600; *People v. Police Commissioners*, 11 Hun, 513; *People v. Sutherland*, 16 Id., 192; *People v. Weigant*, 14 Id., 546. Subd. 5 is not in conflict with the ruling in 45 N. Y., but it settles a question, which was not considered therein, in general accordance with the opinion of POTTER, J., in *People v. Eddy*, 57 Barb., 893; see p. 601."

In this connection, we quote from Mr. Bliss' note to this section in his Code: "The section is new, but the commissioners considered, when prepared by them, that it made no change in the law, regarding subdivision 6 as consistent with 45 N. Y., 772, and 57 Barb., 593, which were then the latest cases; but it is hardly consistent with 69 N. Y., 408, and some other cases since published."

The court, upon the hearing, may make a final order, annulling or confirming, wholly or partly, or modifying, the determination reviewed, as to any or all of the parties.¹ no jurisdiction of the subject-matter, or that there was

It was the settled rule, previous to the enactment of this section, that the power of the supreme court, upon a common law *certiorari*, was limited to a simple reversal or affirmance,² but the codifiers thought best to change it.

If, on examination, it appears that the court below had

¹ Code Civ. Pro., § 2141.

² 36 N. Y., 218.

no evidence legally tending to establish the main facts which could authorize the judgment—in either case, the court will set the judgment aside. In such cases, the court does not deliberate upon the weight and just force of evidence, but determines merely whether there is any evidence whatever;¹ and where the *certiorari* is authorized by statute, the court may also examine and correct any erroneous decisions of the officer upon questions of law.² On a *certiorari* to review an assessment made by judges, under an act authorizing the construction of a dam, and providing that the damages of lands taken might be assessed by judges of the common pleas, it is the duty of the court to inquire into the principles upon which the judges assessed the damages, and if they were erroneous, the whole assessment should be set aside.³ So where the common pleas assessed damages to persons *not* owners, their determination may be reviewed upon the evidence in the return.⁴ In reviewing assessments for local improvements, the court will only look at the principle of apportionments and not to the amount charged to any individual.⁵ The court will not review the acts of boards of supervisors in levying the general town and county taxes, when no complaint is made as to the principle on which the tax was apportioned, but only that the supervisors erred in auditing some of the county charges.⁶ An objection that one of the judges had previously passed upon the same question, cannot be taken for the first time on *certiorari*;⁷ but where more jurors were summoned in a summary proceeding, than the statute prescribes, the proceeding will be reversed on *certiorari*.⁸

¹ 15 Burr., 286; 24 N. Y., 399.

² 6 N. Y., 309.

³ 10 Wend., 166.

⁴ 25 Wend., 157.

⁵ 2 Wend., 395; 15 Id., 374; 23 Id., 277.

⁶ 15 Wend., 198.

⁷ 7 Wend., 264.

⁸ 20 Wend., 207.

Where the determination reviewed is annulled or modified, the court may order and enforce restitution, in like manner, with like effect and subject to the same conditions, as where a judgment is reversed upon appeal.¹

Costs.

Costs, not exceeding fifty dollars and disbursements, may be awarded by the final order, in favor of or against either party, in the discretion of the court.²

At common law no costs were allowed.³

The final order of the court upon the *certiorari* must be entered in the office of the clerk where the writ was returnable. But before it can be enforced, an enrollment thereof must be filed. For that purpose, the clerk must attach together, and file in his office, the papers upon which the cause was heard; a certified copy of the final order; and a certified copy of each order, which in any way involves the merits, or necessarily affects the final order.⁴

The filing of the enrollment in the office of the clerk where the final order is entered, as prescribed in the last section, is a sufficient authority for any proceeding, by or before the body which, or the officer who, made the determination reviewed, which the final order of the court directs or permits. But where the execution of the final order is stayed by an appeal to the Court of Appeals, the proceedings below are stayed in like manner.⁵

No formal judgment is necessary beyond the final order. Formerly a judgment was entered.

If it is desired to enter a judgment, it may be in the usual form of judgment or affirmance, or dismissing writ, as the case may be.

¹ Code Civ. Pro., § 2142.

² Code Civ. Pro., § 2143; 13 Hun, 227; 76 N. Y., 65; 40 How., 35.

³ 39 N. Y., 506.

⁴ Code Civ. Pro., § 2144.

⁵ Code Civ. Pro., § 2145.

Appeals.

The Supreme Court has discretionary power to grant or withhold a common-law *certiorari*, and the exercise of this discretion cannot be reviewed by the Court of Appeals.¹ In *People v. Hanneman*, 85 N. Y., 655, the court said: "We have many times decided that an appeal to this court is not allowed from a decision of the Supreme Court, quashing a writ of *certiorari*. If, in this case, judgment had been made, affirming the action of the commissioners of taxes, an appeal could have been taken to this court." Thus, it would seem, that where an appeal is denied, the order should be one of affirmance of the action of the inferior tribunal, and not quashing the writ. In *People v. French*, 92 N. Y., 306, the court said: "It has been repeatedly held by this court, that upon an appeal from a decision of the court below, rendered upon a common-law *certiorari*, it will look into the record only for the purpose of seeing whether the subordinate tribunal has kept within its jurisdiction, based its decisions upon some legal proof of the facts authorizing it, and violated no rule of law in its proceedings affecting the right of the relator."

In *People v. Board of Police Commissioners*, 93 N. Y., 101, it held that where an order is made denying a motion to quash the writ, issued in a case not reviewable by *certiorari*, an appeal may be taken to the Court of Appeals. So in *People v. Board of Commissioners*, 97 N. Y., 37, it held, that if, where a *certiorari* has been unlawfully or illegally issued, the appellate court may pass upon, and might of its own motion, quash the writ.

In *People v. Commissioners*, 103 N. Y., 370, it was held, that "while an order of the Supreme Court, quashing a common-law *certiorari*, made in the exercise of its discretion by the court, on the ground that the proceedings brought up by the writ ought not to be reviewed, is not appealable to this court, when it adjudicates upon the proceedings, and determines that the

¹ 82 N. Y., 506; 86 Id., 639; 103 Id., 370; 85 Id., 655.

allegations of error are not sustained, it is reviewable here."

The Supreme Court at general term, in *People v. Board of Fire Commissioners*, 30 Hun, 376, says: "As the law is now established by the Code, the court is at liberty to review the evidence and the proceedings upon consideration of the evidence, and to review the decision whenever it would feel justified in setting aside a verdict upon the same evidence as against the weight of evidence."

The expression, "body or officer," as used in this article, includes every court, tribunal, board, corporation, or other person, or aggregation of persons, whose determination may be reviewed by a writ of *certiorari*; and the word "determination," as used in this article, includes every judgment, order, decision, adjudication, or other acts of such a body or officer, which is subject to be so reviewed.¹

Where the right to a writ of *certiorari* is expressly conferred, or the issuing thereof is expressly authorized by a statute; passed before and remaining in force after this article takes effect, this article does not vary, or affect in any manner, any provision of the former statute, which expressly prescribes a different regulation, with respect to any of the proceedings upon the *certiorari* to be issued thereunder.²

This article is not applicable to a writ of *certiorari* brought to review a determination made in any criminal matter, except a criminal contempt of court.³

Aside from chapter 269, Laws of 1880, relating to the review of illegal assessments and erroneous assessments, the only remaining cases under which a statutory *certiorari* can be taken, are those exempted from the provisions of the Repealing Act of 1880. These exceptions are:

"The commissioners of the canal fund or the canal commissioners may in their discretion, cause a *certiorari*

¹ Code Civ. Pro., § 2146.

² Code Civ. Pro., § 2147.

³ Code Civ. Pro., § 2148.

to be brought by the attorney-general, on behalf of the state, from the determination of the canal appraisers upon any legal or constitutional question, to the supreme court, in cases where any damages have been or shall be awarded upon any claim for the deprivation of any right or pretended right to the use of any water privileges or fisheries; or for the temporary use or diversion of any water by the canal commissioners." (Laws 1840, chap. 288, § 16).

The review of proceedings under the town bonding acts is still by *certiorari* under Laws 1871, chap. 926, § 4, and by 2 R. S., 48, § 47 (8th ed., 2273), "Whenever any authority shall be exercised by a court of common pleas, or any officer, pursuant to any provisions of the title referring to trustees and assignees, the proceedings may be removed into the supreme court by *certiorari*, but it must be allowed by a justice of the Supreme Court or a circuit judge, but it does not operate as a stay unless it is so directed in the order.¹"

In the charter of the city of New York it is provided, that "A *certiorari* to review or correct on the merits any decision or action of the commissioners (of taxes and assessments in fixing the valuation of real and personal estate), under either of the two preceeding sections shall be allowed by the Supreme Court or any judge thereof directed to the said commissioners on the petition of the party aggrieved." (Laws of 1882, chap. 410, § 821.)

General observations.

At common law, the office of the writ is to review erroneous decisions of inferior tribunals, in cases when there is no other available remedy; and where otherwise injustice might be done. In all other cases it is confined to bringing up the records to enable the court to determine whether it has acted within or in excess of its jurisdiction.² Unless the statute in express terms makes the

¹ 40 How., 165; 4 Hun, 641; 6 N. Y., 309.

² 15 Wend., 198.

determination of the inferior tribunal *final and conclusive*, the court may, in cases where there is no other available remedy, to prevent injustice, review all questions of *jurisdiction, power and authority* on the part of the inferior tribunal to do the acts complained of, as well as the regularity of their proceedings.¹ Proceedings which show on their face that the action is barred by limitation, raise a question of law, and a judgment rendered thereon is reviewable on *certiorari*.² In *People v. Supervisors*,³ the court held that it was the office of a *certiorari* to review the determination of inferior boards where a claim was rejected as unjust or illegal.⁴ But apparently *contra*, see *People v. Delaney*.⁵ But an examination of that case will show that it does not really conflict with the doctrine of the other cases. Where the statute makes the action of the inferior tribunal *final and conclusive*, their proceedings cannot be revised or reviewed upon *certiorari*.⁶ The granting of the writ rests largely in the discretion of the court, and is not a matter of strict right. It is to be allowed or denied according to the justice and equity of the case;⁷ and will be quashed at any stage of the proceedings when it appears to have been improvidently granted.⁸ It is addressed to all the persons whose return is necessary to enable the court to determine the regularity or validity of the proceedings of the officer or tribunal sought to be reviewed, and the fact that the person is out of office is no objection, if he has the custody of the record; the writ lies against his executors or administrators even after his death, when the record is in their custody.⁹

¹ 40 N. Y., 154; 48 Id., 518; 89 Id., 506; 80 Id., 105.

² 4 S. E., 319 (Ga.).

³ 51 N. Y., 442.

⁴ 52 N. Y., 338.

⁵ 49 Id., 665.

⁶ 55 N. Y., 600.

⁷ 65 Barb., 435; Id., 1; 52 N. Y., 445; 42 Cal., 252; 1 S. E., 337.

⁸ 34 N. J. L., 261.

⁹ 65 Barb., 171; 24 Mich., 182.

At common law a writ of *certiorari* is the proper remedy upon which to correct the errors of all inferior tribunals, where they have exceeded their jurisdiction or proceeded illegally, and there was no appeal or other mode of reviewing or correcting their proceedings;¹ and it may issue in any stage of the proceedings, when the action of the court or the boards whose proceedings are complained of is contrary to law;² or is palpably unjust or oppressive, even though the result ensues from the exercise of its discretion, as where an adjournment is refused, and a decision made without giving a party a fair hearing;³ but if there is a full and adequate remedy by appeal, *certiorari* does not lie;⁴ or if there is an ample remedy by writ of error;⁵ but the mere fact that an appeal lies does not necessarily deprive a party of the remedy. If an appeal has been unlawfully denied, or if the party by fraud, accident or mistake has been deprived of his appeal, *certiorari* is the proper remedy.⁶ The granting of the writ is not a matter of right, but rests in the sound discretion of the court;⁷ and if the party by any *laches* on his part, or on the part of his attorney, has neglected to avail himself of an appeal or other adequate remedy, the writ will be denied;⁸ or if substantial justice has been done, or if ruinous consequences would ensue, and the parties cannot be placed in *statu quo*, the writ will not be granted for mere informalities in the proceedings; but if the record shows want of jurisdiction, or a serious error of the law, the rule is

¹ 22 Ill., 105; 8 Gill (Md.), 150; 8 N. J., 123; 11 Mass., 466; 4 Ired. (N. C.), 155; 5 Binn. (Penn.), 27; 8 Wend., 47; 5 Strebb. (S. C.), 29; 1 Cal., 152.

² 8 Ohio, 142; 4 Hayw. (Tenn.), 100; 2 Yerg. (Tenn.), 173; 13 Pick. (Mass.), 195.

³ 1 Wend., 288; 1 Miss., 112.

⁴ 46 Ga., 41; 8 Nev., 84.

⁵ 1 Ired. (N. C.), 408.

⁶ 2 Murph. (N. C.), 100; 3 Jones (N. C.), 195; T. U. P. Charl. (Ga.), 38; 1 Taylor (N. C.), 15; 4 Greene (Iowa), 94.

⁷ 2 Hill, 9; 24 Vt., 288.

⁸ 1 Overton (Tenn.), 59; 3 Dev. (N. C.), 528; 1 Blackf. (Ind.), 414.

otherwise.¹ The court is bound to act upon strict legal principles, and if any error, however unimportant or foreign to the merits of the case, appears, it is bound to quash the proceedings. But in the exercise of its *discretion* it will examine all the circumstances, and if it finds that substantial justice has been done without violating any *important* rules of proceeding, the writ will not be granted, although some formal or technical errors may appear, and extrinsic evidence is receivable upon this inquiry, not to *contradict* the records, but to show that there was a more perfect compliance with the rules of law than the record shows. But if the record itself shows *affirmative defects*, they are incurable, and the proceedings will be set aside, but where there are no affirmative defects, extrinsic evidence is admissible to show that substantial justice has been done.²

The office of the writ at common law is confined to the correction of the errors of inferior tribunals of every description, whether courts or public boards, where their action directly affects the rights of others, in cases where they exceed their jurisdiction, or act illegally in respect to a substantive matter. But where the error is as to the *facts*, the writ does not lie. Where the judgment of a lower court is correctable on appeal, its record need not be brought up by *certiorari* for the correction of the error by the common law power of superintendence, but may be proved and found with the other facts of the case at the trial term.³ The record must show illegality;⁴ but where the *discretion* of a court or board has been unjustly exercised, and the injustice is palpable and contrary to the settled principles of law;⁵ or when an adjournment is unjustly denied, so that a party is deprived of a fair

¹ 20 Pick. (Mass.), 71.

² 24 Pick. (Mass.), 184; 4 Id., 32; 15 Id., 3; 9 Id., 50; 8 Me., 137; 22 N. J., 1026.

³ 9 Atlantic Rep., 794.

⁴ 8 Ohio, 142.

⁵ 1 Miss., 112.

hearing, *certiorari* is the proper remedy;¹ or if he has been unjustly deprived of an appeal;² or if his appeal has been dismissed improperly.³ It lies to correct proceedings in cases of foreign attachment;⁴ or to take up the proceedings of an inferior tribunal when an appeal does not lie;⁵ or where there is irregularity in proceedings for forcible entry and detainer;⁶ or where the action of an inferior tribunal is contrary to law as relates to its method of procedure;⁷ or where proceedings are taken against a party without notice;⁸ to review the proceedings of surrogates, judges of probate, or of orphans' courts;⁹ of justices' courts;¹⁰ of commissioners of highways;¹¹ of municipal boards;¹² of county commissioners;¹³ or anybody that acts in a judicial capacity, to correct *judicial* acts, but not where the matters complained of are purely ministerial.¹⁴ Generally, the court will not look beyond the records, except to ascertain whether substantial justice has been done, when the only matter complained of is informality in proceedings;¹⁵ nor will it examine into the *merits* of the case;¹⁶ nor inquire as to conclusions of fact;¹⁷ or the decision of the court thereon;¹⁸ but is confined exclusively to such irregularities and errors as appear upon the face of the record, and if none

¹ 8 Wend., 47.

² 2 Hawks (N. C.), 41; 4 Hayw. (Tenn.), 143; 1 Bush. (N. C.), 41.

³ 2 Overton (Tenn.), 108.

⁴ 2 Ohio, 27; 3 Johns. 141; 13 N. J., 250; 17 Id., 104.

⁵ 5 Humph. (Tenn.), 425; 4 Dev. (N. C.), 99; 6 S. & R. (Penn.), 524.

⁶ 1 Ark., 480; 1 Hempst. (Tenn.), 3.

⁷ R. M. Charlt. (Ga.), 208; 2 Ala., 35; 27 Tex., 78.

⁸ 3 Mass., 229; 15 Johns., 557; 8 Me., 135.

⁹ 1 Nev., 82; 10 Ala., 622; 14 N. J., 207; 3 H. & M. (Md.), 348.

¹⁰ 1 Swan. (Tenn.), 277; 19 Penn. St., 495; 1 Cow., 437.

¹¹ 8 Vt., 271; 8 Pick. (Mass.), 440; Id., 218; 32 N. Y. St. Rep., 649.

¹² 16 Ga., 172.

¹³ 19 Pick. (Mass.), 298.

¹⁴ 5 Barb., 43; 4 Cow., 297; 8 Cush. (Mass.), 292; 16 Abb. Pr., 169.

¹⁵ 21 N. Y., 82; 1 Minn., 45; 30 N. J., 331; 14 Cal., 479.

¹⁶ 15 Abb. Pr., 167; 18 N. J., 179.

¹⁷ 24 N. J., 37; 3 Wend., 342.

¹⁸ 24 N. J., 388; 25 Id., 178; 34 Penn. St., 184; 7 Mich., 472.

appear, the writ will be denied;¹ and the court may award the writ in the first instance, or issue an order to show cause. In addition to the common-law remedy by *certiorari*, provision is made by statute in most of the States for remedies thereby, in addition to the common-causes for which it will issue, but for such instances, reference must be had to the several statutes, as it would be impractical to enumerate or review them here.

A sentence in excess of the term fixed by law will be reversed upon *certiorari*.² The action of canal appraisers, so far as legal questions are raised by the proceedings before them, may be reviewed by *certiorari*.³ The action of a board of election canvassers may be reviewed by *certiorari* to the extent of determining whether their action was legal.⁴ When no provision is made for an appeal from a surrogate, the proceedings may be brought up by *certiorari*.⁵ So, to review the action of a justice of the peace in a matter over which he had no jurisdiction.⁶ Proceedings for the assessment and collection of taxes may be brought up and reviewed by *certiorari*;⁷ and should be brought in the name of the people on the relation of any taxpayer aggrieved thereby.⁸ *Certiorari* lies to review tax assessments;⁹ but it will not be granted until the assessment is complete;¹⁰ nor will a *certiorari* be allowed while an appeal is pending;¹¹ but the pendency of proceedings in equity is no reason for refusing the writ. When commissioners of assessment arbitrarily

¹ 21 Wend., 651; 6 Cow., 555.

² 3 Brewst. (Penn.), 30.

³ 2 Lans., 368.

⁴ 65 Penn. St., 26.

⁵ 44 Ala., 333.

⁶ 41 Ga., 624.

⁷ 57 Barb., 577.

⁸ Id.; 25 Wis., 594; 34 N. J. L., 438; 16 Gray (Mass.), 38; 47 Mo., 594.

⁹ 1 T. & C., 101; 2 Hun, 582; 49 N. Y., 655; 53 Id., 49; 4 Hun, 187; 4 T. & C., 289.

¹⁰ 5 T. & C., 609.

¹¹ 4 T. & C., 438.

assume that all lands are to be equally benefited by a public work, without considering the relative difference of situation, it is erroneous, and such an error as is ground for reversal on *certiorari*.¹ *Certiorari* has been held a proper remedy to review proceedings to drain lands;² or indeed the *judicial* acts of any public body.³ It lies as a matter of right to review an insolvent discharge.⁴ A person who was not a party to the proceedings below may sue out *certiorari* if he is a party in interest;⁵ as on the application of the president of a corporation when the corporation is interested.⁶ After appearance and full return, objection cannot be made that the writ is improperly addressed.⁷ The return to a common law writ of *certiorari* is conclusive.⁸ *Certiorari* will not lie to remove a record that is lost from the files; the loss must first be supplied in the inferior court, as a court cannot be compelled to certify to that which it has no means of verifying.⁹ Nor will it lie when there is an adequate remedy by appeal;¹⁰ nor to review the proceedings of a court in refusing to grant a new trial;¹¹ nor to a court of concurrent jurisdiction;¹² the rule being that a writ of *certiorari* may issue, "if the record pleaded is in a more base court than that in which it is."¹³ Proceedings under bonding acts may be reviewed by *certiorari*, under the act of 1871;¹⁴ and there would seem to be no question that the right existed at common law.¹⁵ A court of gen-

¹ 55 N. Y., 604.

² 3 T. & C., 224.

³ 7 Lans., 220; 55 N. Y., 604; 51 Id., 442.

⁴ 4 Hun, 641.

⁵ 52 N. Y., 45.

⁶ 51 N. Y., 443.

⁷ 50 N. Y., 525.

⁸ 6 Hun, 625.

⁹ 1 Cal., 490.

¹⁰ 8 Nev., 84; 46 Ga., 41.

¹¹ 43 Cal., 312.

¹² 1 Cal., 194.

¹³ 4 Viner's Abr., 329.

¹⁴ 63 Barb., 454.

¹⁵ 7 Lans., 467; Fitzherbert's N. B., 245.

eral jurisdiction has, at common law, power to review on *certiorari* the final adjudications of special statutory tribunals that act in a summary way different from 'the course of the common law;' as to a board of equalization to equalize taxes;¹ the proceedings of highway officers in opening or closing highways;² of commissioners to locate a highway;³ of supervisors on a claim, and the court, while it cannot compel the board to act, can correct any error in their proceedings, and if the board should then refuse to act, the court can give the relief to which the party is entitled.⁴ The effect of a *certiorari* is to present to the court the grounds upon which a judicial body proceeded, and the court is to say whether, upon the facts embraced in the record, it acted rightly, and if not, to correct the error.⁵

The only effect of the writ is to bring up the record of proceedings, and the case must be decided upon the record alone, and if there is no error in that, the judgment or action of the inferior tribunal will be affirmed, otherwise the proceedings of the lower tribunal should be quashed.⁶ The court can only deal with questions of law, and cannot say what the court should have done if the facts had been different.⁷ When proceedings are brought up from an inferior court on a writ of *certiorari*, whatever the evidence in the inferior tribunal *tended* to show, *is treated as proved* in support of the judgment; as where, in an action for money had and received upon a draft, evidence that the defendant was present when another transferred the draft and received the money, was held sufficient to authorize the presumption that the money was paid to the defendant by such other

¹ 50 Mo., 134; 53 N. J. L., 200; 60 Me., 266.

² 32 Cal., 582.

³ 2 Oregon, 34.

⁴ 97 Mass., 193.

⁵ 51 N. Y., 442.

⁶ 35 N. J. L., 558; 28 Wis., 270.

⁷ 41 Ala., 478; 35 N. J. L., 558; 28 Wis., 270.

⁸ 84 N. J. L., 343; 16 Gray (Mass.), 341.

person.¹ The court will not go beyond the record. Thus, where an affidavit complains of rulings of the court, but no return is made except of the record, and the plaintiff went to trial on the return, it was held that the court could not go beyond the record before it. In such a case the evidence forms no part of the record, and in the absence of anything in the record to establish the contrary, it will be presumed that the evidence was sufficient both in form and substance to warrant all the findings.² The fact that all the allegations of error are not sustained, or that improper parties are made defendants, is not necessarily fatal to the proceedings. In such cases the court may quash the writ, or proceed to correct such proceedings as are sought to be reviewed as are illegal, and to affirm such as are legal if they are independent of each other, and may consider the case upon its merits if the public interests require it.³ Costs upon a *certiorari* may be allowed or not, in the discretion of the court.⁴ The Supreme Court may, in its discretion, grant or refuse a common law writ of *certiorari*, and its decision is not reviewable upon appeal. The fact that the relator has no other remedy does not affect the discretionary power of the court. Unreasonable delay in applying for, may be a good ground for denying the writ, or for quashing it even after allowed, and even after hearing and return. Thus, in *People v. Hall et al.*,⁵ the writ was issued September 2, 1872, against the defendants, as commissioners of the town of Ontario, under an act authorizing towns to bond themselves in aid of the Lake Shore Railroad. The return of the commissioners show that the assessors made their return August 30, 1870. The papers were filed December 23, 1870. The commissioners were appointed December 24, 1870, and subscribed for stock which was fixed at \$85,000,

¹ 25 Mich., 132.

² 25 Mich., 251; 12 Minn., 78.

³ 57 Barb., 593.

⁴ 40 How. Pr., 35.

⁵ 53 N. Y., 547.

and on September 23, 1871, they issued \$34,000 of bonds to the railroad company, and on November 13, 1871, \$17,000 more. The General Term, upon the hearing on the return, quashed the writ upon the ground of unreasonable delay in bringing the writ. The Court of Appeals held that the action of the General Term was final; that the court below exercised its discretion, which is not reviewable, and that in this class of cases appeals lie only when the court has passed upon the merits, and questions of law are presented.¹ As to effect of delay in bringing writ, see *People v. Supervisors*,² and *People v. The Mayor*³ in which it was held a case could rarely happen in which it would be proper to allow the writ after the lapse of two years. But RAPALLO, J., very justly says that "there is no fixed limit as to time, and that circumstances might arise in which even a *shorter* delay would be unreasonable." Thus it will be seen that in all cases where *laches* in bringing the writ are alleged, the reasonableness or unreasonableness of the delay must be determined by the circumstances of each case.⁴ The determination of the Supreme Court on the question of the *laches* of the prosecutor in applying for *certiorari* is final and not subject to review or error.⁵

A petition for *certiorari* as a substitute for appeal, lost by the appeal bond not being filed in time, in the absence of proof that the appeal was lost by anything said or done by the appellee or his counsel, and no good excuse given for delay in filing the bond, should be dismissed,⁶ so, it will not be granted one who failed to perfect his appeal on account of an agreement between the parties that lapse of time should not deprive petitioner of his appeal, if a compromise should not be affected, when the

¹ 19 N. Y., 531; 47 Id., 420.

² 15 Wend., 198.

³ 2 Hill, 12.

⁴ 65 Barb., 9; 2 Hun, 385; 1 Id., 544.

⁵ 15 Atlantic Rep., 10 (N. J.).

⁶ 99 N. C., 127.

evidence shows that the petitioner paid the judgment on a compromise.¹

Certiorari to review illegal and erroneous assessments.

Laws of 1880, Chapter 269, as amended by Laws of 1887, Chapter 342:

SECTION 1. A writ of *certiorari* may be allowed by the Supreme Court on the petition duly verified, of any person or corporation assessed and claiming to be aggrieved, to review an assessment of real or personal property for the purpose of taxation made in any town, village, or city of this State, when the petition shall set forth that the assessment is illegal, specifying the grounds of the alleged illegality, or is erroneous by reason of over valuation, or is unequal in that the assessment has been made at a higher proportionate valuation than other real or personal property on the same roll by the same officers, and that the petitioner is or will be injured by such alleged illegal, erroneous or unequal assessment. When the alleged illegality, error or inequality affects several persons in the same manner who are assessed upon the same roll, they may unite in the same petition, and in that case the writ may be allowed, and the proceedings authorized by this act had in behalf of all such petitioners.

§ 2. Such writ shall only be allowed by a justice of the Supreme Court in the judicial district, or at a special term of the court in the judicial district in which the assessment complained of was made, and shall be made returnable at a special term in said district. The writ shall not be granted, unless application therefor shall be made within fifteen days after the completion and delivery of the assessment roll, and notice thereof given as provided in the act. A writ of *certiorari* allowed under this act shall not stay the proceedings of the assessors, or other officers to whom it is directed, or to whom the assessment roll may be delivered, to be acted upon according to law.

¹ 99 N. C., 238.

§ 3. The court or justice granting the writ shall prescribe in the writ the time within which a return thereto must be made, which shall not be less than ten days, and may extend such time. The assessors or other officers making a return to such writ shall not be required to return the original assessment roll, or other original papers, acted on by them; but it shall be sufficient to return certified or sworn copies of the roll, or other papers, or of such portions thereof as may be called for by such writ. And the return may concisely set forth such other facts as may be pertinent and material, to show the value of the property assessed on the roll, and the grounds for the valuation made by the assessing officers, and the return must be verified.

§ 4. If it shall appear, by the return to such writ, that the assessment complained of is illegal, erroneous or unequal for any of the reasons alleged in the petition, the court shall have power to order such assessment, if illegal, to be stricken from the roll, or, if erroneous or unequal, to order a reassessment of the property of the petitioner, or the correction of such assessment, in whole or in part, in such manner as shall be in accordance with law, or as shall make it conform to the valuations and assessments applied to other real or personal property in the same roll, and secure equality of assessment. If, upon the hearing, it shall appear to the court that testimony is necessary for the proper disposition of the matter, the court may take evidence, or may appoint a referee to take such evidence, as the court may direct, and report the same to the court, and such testimony shall constitute a part of the proceedings upon which the determination of the court shall be made.

§ 5. A new assessment or correction of an assessment made by order of the court, shall have the same force and effect as if it had been so made by the proper assessing officers within the time originally prescribed by law for making such assessment. Disobedience to a writ or

order in any proceeding under this act may be punished by the court as for a contempt.

§ 6. Costs shall not be allowed against assessors or other officers whose proceedings may be reversed under this act, unless it appear to the court that they acted with gross negligence, in bad faith, or with malice. If the writ shall be quashed, or the prayer of the petitioner denied, costs shall be awarded against the petitioner, but the costs shall not in any case exceed the costs and disbursements taxable in an action upon the trial of an issue of fact in the Supreme Court.

§ 7. Appeal may be taken by either party from an order, judgment or determination under this act as from an order, and shall be heard and determined in like manner. All issues and appeals in any proceedings instituted under this act shall have preference over all other civil actions and proceedings in all courts.

§ 8. If final judgment shall not be given in time to enable the assessors or other officers to make a new or corrected assessment for the use of the board of supervisors at their annual session, and it shall appear from said judgment that said assessment was illegal, erroneous or unequal, then there shall be audited and allowed to the petitioner, and included in the next year's tax levy of said town, village or city and paid to the petitioner, the amount with interest thereon, from the date of payment, in excess of what the tax should have been as determined by such judgment or order of the court. But in case the amount deducted from such assessment by the judgment or order exceed the sum of ten thousand dollars, the tax so to be refunded by reason of such corrected assessment other than the proportion or percentage thereof collected for such town, village or city purposes shall be levied upon the county at large and audited by the board of supervisors and paid to the petitioner, and in such case the board of supervisors of the county shall also audit and levy upon such town, village or city the proportion or percentage of such excess

of tax collected for such town, village or city purposes, and the same shall be collected and paid to the petitioner without other or further audit. (Laws 1887, chap. 342). This amendment shall not apply to any case where the tax so adjudged or ordered has been heretofore included in the tax levy of any town, village or city and paid over to the petitioner. (Id).

§ 9. All assessment rolls, when finally completed and verified by the assessors, shall, in towns, on or before the first day of September, and in incorporated villages and cities at the time prescribed by their respective charters or laws applicable to them, be delivered to the town, village or city clerk, or other officer to whom such rolls are or may be required by law to be delivered, and there to remain with such clerk or other officer for a period of fifteen days, for public inspection. The assessors, or other officers who complete and verify the assessment roll, shall, after they have delivered the same to the said town, village or city clerk, or other officer, forthwith give public notice by posting the same in at least three of the most public places in said town, village or city, or by publishing the same in one or more newspapers published therein, that such assessment roll has been finally completed, the officer to whom the same has been delivered, and the place where the same will be open to public inspection. The fifteen days from which to complete the time within which the application for the writ of *certiorari* can be made under this act, shall be the time when said public notice is first given.

§ 10. This act shall not be construed to repeal or abridge any other right or remedy given to review an assessment by any law applicable to any city or incorporated village, or by the charters thereof.

The Court of Appeals in a recent case say : "The provisions of the act of 1880, in regard to the review and correction of assessments by *certiorari*, confers upon the court the power of review and correction, only when it

appears by the return of the writ, or the evidence taken thereunder, that the assessment complained of is illegal, erroneous or unequal. It does not authorize a review, when it appears that the assessment in question was made in accordance with the statute then in force, and in the due performance of the duty when obligatory upon the assessors."¹ Also, "the act of 1880, does not permit a party complaining of an assessment, who has omitted to avail himself of the opportunity provided by statute to remedy his grievance, after the assessment has been confirmed by lapse of time, to remit the collection of the tax by a proceeding under this act," it has been held that it is essential to the support of a claim to reduce or nullify an assessment, made by the proper officers, that it should be made to appear affirmatively, by sufficient proof, that the assessment is in part or in whole erroneous, and if the evidence leaves the matter in doubt, it is the province of the assessors to determine the value and amount of property liable to taxation."² It seems that the act of 1880 does not apply to assessments for local improvements, but relates to town, ward, village or city assessments imposed upon the whole body of taxpayers for some general purpose of taxation.³ A writ of *certiorari* will not lie, unless the party applying therefor has first made the application provided by the statute for relief.⁴ The writ must be made returnable at a special term, in the judicial district in which the assessment complained of was made.⁵ "For the purpose of an appeal, a judgment in proceedings by *certiorari* to review an assessment under the act of 1880, is to be considered as an order, and an appeal to the Court of Appeals must be taken within the time prescribed for appeals from

¹ 91 N. Y., 593.

² 99 N. Y., 254.

³ 99 N. Y., 154.

⁴ 38 Hun, 7.

⁵ 39 Hun, 529; 32 N. Y. State Rep., 599.

⁶ 6 N. Y. State Rep., 744; 106 N. Y., 671.

orders, *i. e.*, sixty days.¹ The act of 1880, does not require that the petition shall be signed by each of the petitioners acting individually for himself, but its provisions will be satisfied, when they are represented by attorneys acting in their behalf.² The strict rules of evidence are not applied in cases arising under the act of 1880. A corporation cannot review under this act the tax imposed upon the shares of the stockholders, because the tax would be against the property of the persons who were stockholders in the corporation, and they were the only persons who could be aggrieved by the tax.³ If the relators intends to rely upon a defect in the proceeding, *e. g.*, the competency of an officer to take an oath, he must under section 1, state in his petition the grounds of the illegality; otherwise the defect is cured.⁴ On denying the petition for a review of the assessment, the special term has no discretion to withhold costs.⁵ The assessors are only relieved from costs upon the hearing at special term on return to the *certiorari*. The costs on appeal therefrom are discretionary with the court.⁶

¹ 101 N. Y., 610.

² 41 Hun, 307.

³ 2 N. Y. St. Rep., 615; 41 Hun, 344.

⁴ 32 N. Y. State Rep., 605.

⁵ 6 N. Y. State Rep., 112.

⁶ 1 N. Y. State Rep., 37.

CHAPTER IV.

THE ACTION OF QUO WARRANTO.

The writ of *quo warranto*, and proceedings by information in the nature of *quo warranto*, have been abolished. The relief formerly obtained by means of either of those writs, may be obtained by action, where an appropriate action therefor is prescribed in this act.¹

An examination of the provisions of the statute under which the former proceedings were had, by information in the nature of a *quo warranto*, and the provisions of the Code by which a civil action is substituted as a means of attaining the same remedies, will show that the former proceeding by information, and the latter by action, are substantially the same; almost every provision of the Code is a re-enactment of the same or similar provisions of the statute; consequently, the practice under the Code will differ from that under the statute only as the practice in civil actions may differ from that in special proceedings. The differences between the two modes of proceeding will be pointed out during the progress of this chapter.

Against corporations. — The attorney-general, whenever he is so directed by the legislature, must bring an action against a corporation created by or under the laws of the State, to procure a judgment, vacating or annulling the act of incorporation, or any act renewing the corporation, or continuing its corporate existence, upon the ground that the act was procured upon a fraudulent suggestion, or the concealment of a material fact, made by or with the knowledge and consent of any of the persons incorporated.²

¹ Code Civ. Pro., § 1983.

² Code Civ. Pro., § 1797.

Or the attorney-general may bring the like action on leave granted for that purpose by the court,¹ for the purpose of vacating the charter or annulling the existence of a corporation upon the ground that such corporation has either: 1. Offended against any provision of an act by or under which it were created, altered or renewed, or an act amending the same and applicable to the corporation; or, 2. When it shall have violated any provision of law, whereby it shall have forfeited its charter or become liable to be dissolved by abuse of its powers; or, 3. Whenever it shall have forfeited its privileges or franchises by failure to exercise its powers; or, 4. Whenever it shall have done or omitted any act which amounts to a surrender of its corporate rights, privileges and franchises; or, 5. Whenever it shall have exercised a franchise or privilege not conferred upon it by law;² and it is made the duty of the attorney-general, whenever he has good reason to believe that any of these acts and omissions can be established by proof, to apply for such leave; and upon leave being granted, to bring such action, in every case of public interest, and also in every other case where satisfactory security for costs and expenses shall be given.³ Actions of this character must be brought by the attorney-general, in the name of the people of the State.⁴

Leave, how obtained.—Leave to bring the action is granted upon the application of the attorney-general; and the court, in its discretion, directs notice of such application to be given to the corporation or to its officers, previous to granting such leave; and it may hear the corporation in opposition thereto.⁵

It is said in a recent case, that the attorney-general may, under sections 1798, 1799, make an *ex parte* appli-

¹ Code Civ. Pro., § 1799; see Code Civ. Pro., § 1804, *supra*.

² Code Civ. Pro., § 1798.

³ Code Civ. Pro., § 1808.

⁴ Code Civ. Pro., § 1934.

⁵ Code Civ. Pro., § 1799.

cation for leave to bring an action against a corporation; but it is within the power of the court to direct that notice of the application be given to the proposed defendant. Where the application has been granted *ex parte*, the defendant may, after the commencement of the action, inquire into the regularity of the leave; and the proper mode of presenting objections to the order, and directing attention to whatever might, in the first instance, have induced the court to refrain from granting the same, is to move, before the court, to set aside the order. Application by the attorney-general for leave to begin an action must be made on written petition, and whatever papers are referred to in the petition become the basis thereof, and should be filed therewith, and the petition must be signed by the attorney-general himself. Upon the application, the court never demands the evidence upon which the application can be successfully maintained, nor does it, as a rule, require more than the most general statement of the right to maintain an action. It does require the certainty of a complaint.¹ An action, brought as prescribed in this article, is triable, of course and of right, by a jury, as if it was an action specified in section 968 of this act, and without procuring an order, as prescribed in section 970 of this act.²

When action will lie.—The omission of a corporation to exercise its powers, when unconnected with other acts, does not work a forfeiture.³ Non-compliance with the requirements of the act of incorporation as to construction of a road is a misuser which forfeits, but the non-compliance with the conditions must be substantial.⁴ The purchase by copartners of the charter and property of a manufacturing corporation does not dissolve it.⁵ A bank does not forfeit its charter by insolvency and clos-

¹ 2 McC., 295, sub.

² Code Civ. Pro., § 1800.

³ Hopk., 354.

⁴ 23 Wend., 194.

⁵ 4 Paige, 481.

ing its banking operations, if it resumes payment before prosecution by the people.¹ A corporation may be dissolved, as to creditors, by a surrender of its corporate rights.² Suffering an act to be done which destroys the end and object of its creation is equivalent to surrender.³ Where, after the lapse of over fifty years from the incorporation of a turnpike company and the construction of its road, an action was brought to vacate its charter on the ground of misuser in omitting to comply with the provisions of the general turnpike law in the original construction of the road, and also in failing to keep the road in repair, held, that the fact must be established not only of a deviation from the statute, in the construction of the road, but that the road was thereby rendered injurious or inconvenient to the public; that the company was not bound to continue the road in the same condition required in its original construction, but only in a state of general repair; and that to warrant a forfeiture for an omission to keep in repair, it must be alleged and found that the want of repair was such as to render the road dangerous or inconvenient to travelers.⁴

The legislature in chartering a corporation has the power to provide that it may lose its corporate existence without the intervention of the courts, by any omission of duty or violation of its charter, or default as to limitations imposed, when the language used shows the legislative intent was to make the continued existence of the corporation depend upon its compliance with some requirement of the charter. In case of non-compliance, the powers, rights and franchises granted are forfeited and terminated. It is not simply a case of forfeiture to be enforced in an action by the attorney-general,⁵ but the forfeiture of rights which have been lawfully used

¹ 6 Cow., 196.

² 19 Johns., 456.

³ 6 Cow., 217; 27 Hun, 582.

⁴ 47 N. Y., 586.

⁵ 78 N. Y., 524.

and enjoyed, cannot be inquired of collaterally; hence, it is not available as a ground for enjoining the road of a corporation, at the suit of a property owner injured thereby.¹

A municipal corporation has the same right to question the corporate existence, and the rights of a railroad corporation seeking to use its streets, as a private owner would where the use of his property is sought.² The charters of business corporations imply and require that they shall perform the business for which they were instituted, and a substantial suspension of business after its commencement, like an entire omission to begin business, is a violation of a charter.³ A corporation may be dissolved by forfeiture through abuse or neglect of its franchises; but such forfeiture, unless there be special provision by statute, can only be enforced by the sovereign power in some proceeding instituted in its behalf.⁴

Where an action is brought to annul the charter of a railroad company, another company, which has become a lessee of part of the road, is entitled, in its application, to be made a defendant.⁵ A forfeiture may be waived by legislation.⁶ A portion of the stockholders of a manufacturing corporation, cannot maintain an action to dissolve it; nor have they, in the absence of proof of fraud, mismanagement or wrong-doing on the part of its directors, an absolute right to have a receiver of its property appointed; and this, although the corporation be utterly insolvent. It is at least discretionary with the court.⁷

An action cannot be maintained against a corporation, by a stockholder, to effect a forfeiture of the charter, for non-user within a year, and in any case, even when

¹ 3 Abb. N. C., 306; appeal determined, 67 N. Y., 484.

² 78 N. Y., 524.

³ 4 Sandf. Ch., 559.

⁴ 80 N. Y., 599.

⁵ 77 N. Y., 232.

⁶ 9 Wend., 351; 70 N. Y., 327; 54 How., 168.

⁷ 80 N. Y., 599.

the action is brought by the attorney-general, a receiver cannot be appointed until judgment in the action.¹ The complaint, in an action by the people against a corporation for its dissolution, alleged that the corporation was insolvent thirteen years before; that it then surrendered its property to its creditors; that ever since it had remained insolvent and neglected to pay its debts, and entirely suspended its ordinary business; that certain defendants named claiming to be stockholders of the original corporation, had usurped the franchise, pretended to elect directors, and commenced an action to obtain title and possession of the road, which facts were not denied in the answer, although the alleged forfeiture was sought to be excused. *Held*, that no issue was formed by the pleadings; and judgment, as prayed in the complaint, and also appointing a receiver of the original corporation, was properly rendered at special term, on a motion for judgment upon pleadings, or for other and further relief.²

Judgment.—Where any of the matters, specified in section 1797 or section 1798 of this act, are established in an action brought as prescribed in either of those sections, the court may render final judgment that the corporation, and each officer thereof, be perpetually enjoined from exercising any of its corporate rights, privileges, and franchises, and that it be dissolved. The judgment must also provide for the appointment of a receiver, the taking of an account, and the distribution of the property of the corporation, among its creditors and stockholders, as where a corporation is dissolved upon its voluntary application, as prescribed in chapter seventeenth of this act.³ And in such case, or in case the judgment be against persons claiming to be a corporation, the court may direct the costs to be collected by execution against

¹ 61 Barb., 9.

² 42 N. Y., 217.

³ Code Civ. Pro., § 1801.

any of the persons claiming to be a corporation, or by warrant of attachment, or other process, against the person of any director or other officer of the corporation.¹

Injunction may issue.—In an action, brought as prescribed in this article, an injunction order may be granted at any stage of the action, restraining the corporation, and any or all of its directors, trustees and other officers, from exercising any of its corporate rights, privileges or franchises; or from exercising certain of its corporate rights, privileges, or franchises specified in the injunction order; or from exercising any franchise, liberty or privilege, or transacting any business, not allowed by law. Such an injunction is deemed one of those specified in section 603 of this act, and all the provisions of title second of chapter seventh of this act, applicable to an injunction specified in that section, apply to an injunction granted as prescribed in this section, except that it can be granted only by the court.²

Filing and publishing judgment.—Where final judgment is rendered against a corporation, in an action, brought as prescribed in this article, the attorney-general must cause a copy of the judgment-roll to be forthwith filed in the office of the secretary of State; who must cause a notice of the substance and effect of the judgment, to be published, for four weeks, in the newspaper printed at Albany, in which legal notices are required to be published, and also in a newspaper printed in the county, wherein the principal place of business of the corporation was located.³

Certain corporations excepted.—Articles second, third and fourth of this title, do not apply to an incorporated library society; to a religious corporation; to a select school or academy, incorporated by the regents of the university, or by an act of the legislature; or to a mu-

¹ Code Civ. Pro., § 1987.

² Code Civ. Pro., § 1802.

³ Code Civ. Pro., § 1803.

municipal or other political corporation, created by the constitution, or by or under the laws of this State.¹

Compelling officers and agents to testify.—In an action, brought as prescribed in article second, third, or fourth of this title, a stockholder, officer, alienee or agent of a corporation, is not excused from answering a question, relating to the management of the corporation, or the transfer or disposition of its property, on the ground that his answer may expose the corporation to a forfeiture of any of its corporate rights, or will tend to convict him of a criminal offense, or to subject him to a penalty or forfeiture. But his testimony shall not be used, as evidence against him, in a criminal action or special proceeding.²

Action upon information or complaint of course against individuals.

The attorney-general may maintain an action, upon his own information, or upon the complaint of a private person, in either of the following cases:

1. Against a person who usurps, intrudes into, or unlawfully holds or exercises, within the State, a franchise, or a public office, civil or military, or an office in a domestic corporation.

2. Against a public officer, civil or military, who has done or suffered an act which by law works a forfeiture of his office.

3. Against one or more persons who act as a corporation within the State without being duly incorporated; or exercise, within the State, any corporate rights, privileges or franchises not granted to them by the law of the State.³

It is only the old form of the writ of *quo warranto* that is done away with. The jurisdiction and power of the courts is not touched. The right to seek and reach, through them, all the remedy which the writ or infor-

¹ Code Civ. Pro., § 1804.

² Code Civ. Pro., § 1805; 7 Civ. Pro., 5.

³ Code Civ. Pro., § 1948.

mation once offered remains.¹ It furnishes the only remedy for determining the title to office.² The title to office cannot be tried by suit for salary.³ It is the appropriate action to test the legality of a corporation formed under the general village act.⁴ The remedies given by statute for testing by a direct action the title of officers of a corporation are exclusive.⁵

The action lies against persons who intrude into the office of directors of a corporation, or into an office created for the government of a corporation, or against persons who usurp the right to be a corporation.⁶ It is the proper remedy where an unauthorized person has usurped the office of alderman in a municipal corporation;⁷ against one intruding into the office of sheriff by reason of an unlawful decision of the board of county canvassers in his favor;⁸ to oust a county judge alleged to have obtained his office by a promise to serve for less than the legal salary;⁹ to try the title to a military office.¹⁰ It will lie where the party proceeded against is a *de facto* or *de jure* officer in possession of the office, and the facts are disputed.¹¹ A claimant to a municipal office cannot maintain an action in his own name, when it does not appear that any person claims the office in hostility to him, or that there has been any interference with his legal rights as an officer by defendant; nor can an individual, as a taxpayer, maintain an action to determine the validity of an election, or to restrain illegal acts.¹²

The action will not lie against the secretary and treas-

¹ 9 Reporter, 479; 80 N. Y., 117.

² 45 How., 110; 14 Abb. N. S., 191; 24 N. Y., 86

³ 15 Hun, 204.

⁴ 70 N. Y., 518.

⁵ 14 Abb. N. S., 191

⁶ 4 Cow., 358.

⁷ 4 Abb., 121.

⁸ 4 Cow., 297.

⁹ 25 Hun, 503.

¹⁰ 25 Barb., 254.

¹¹ 77 N. Y., 503.

¹² 63 N. Y., 320; 67 Barb., 312; 4 Hun, 627.

urer of a railroad company, holding his office as a mere servant, and at the will of the directors.' A civil action cannot be maintained in the name of the people for the redress of private wrongs; the people cannot intervene, except upon the assertion of a distinct right on the part of the public in respect to the subject-matter litigated.' The action will not lie before the commencement of the term of office.' The title of rival claimants to the office of trustee of a religious corporation cannot be determined in an equitable action brought by one claimant or set of claimants against another or others, the remedy is by an action brought by the attorney-general in the name of the people.' *Quo warranto* is the remedy for intrusion into an office,' but where the people, through their constitutional agents, ratify and recognize the title of a citizen to an office, it is not competent for them to question it by *quo warranto*.'

The attorney-general may locate the place of trial in any county of the State, subject to the power of the court to change it for the convenience of witnesses, whenever the same is in a proper condition for such a motion.' The defendant cannot have the place of trial changed on account of residence.' It is not necessary for the attorney-general to obtain leave of the court to bring an action under this section.' The right to remove one who has unlawfully intruded into a public office is vested in the State, and its decision by the attorney-general, as to whether or not an action shall be brought is final, and cannot be reviewed by the courts.'¹⁰ The attorney-general, in an action brought by him, represents the whole

¹ 1 Lans., 202.

² 57 N. Y., 161.

³ 11 Abb. N. S., 129.

⁴ Code Civ. Pro., § 406.

⁵ 16 Hun, 219.

⁶ 66 N. Y., 238.

⁷ 10 N. Y. St. Rep., 577; affirmed 12 N. Y. St. Rep., 409.

⁸ 10 N. Y. St. Rep., 577.

⁹ 27 Hun, 528.

¹⁰ 8 Hun, 384; 22 Barb., 114; 67 N. Y., 384.

people and a public interest, and no question can be presented affecting only mere individuals and private rights.¹

Allowances to compensate special counsel employed by the attorney-general, in actions in which the State is interested, are not authorized.² In a late case, this holding was explained as being only a determination that the attorney-general, except in the cases pointed out by the statutes, was not authorized to employ counsel to appear for the people, so as to make their compensation a charge against the treasury; but not a decision that he could not depute special counsel to appear in his behalf, they making no claim against the State for compensation, nor that their right to so appear was open to question, more freely than if they claimed to represent a private individual.³ The attorney-general may stipulate to waive right of appeal in action under Laws 1868, chapter 869, against canal contractors.⁴

The attorney-general possesses the same powers he had at common law, and such additional ones as legislature has conferred upon him.⁵

In an action, brought as prescribed in the last section, for usurping, intruding into, unlawfully holding or exercising an office, the attorney-general, besides stating the cause of action in the complaint, may, in his discretion, set forth therein the name of the person rightfully entitled to the office, and the facts showing his right thereto; and thereupon, and upon proof, by affidavit, that the defendant, by means of his usurpation or intrusion, has received any fees or emoluments belonging to the office, an order to arrest the defendant may be granted by the court or judge. The provisions of title first of chapter seventh of this act apply to such an order, and the proceedings thereupon and subsequent thereto, except where special provision is otherwise made in this title.

¹ 89 N. Y., 76.

² 88 N. Y., 571; 11 Abb. N. C., 304; 2 McCarthy, 295.

³ 99 N. Y., 57.

⁴ 52 N. Y., 306.

⁵ 2 Lans., 396.

For that purpose, the order is deemed to have been made as prescribed in section 549 of this act. Judgment may be rendered upon the right of the defendant, and of the party so alleged to be entitled; or only upon the right of the defendant, as justice requires.¹

It need not be averred in the complaint, that the relator possessed the requisite qualifications nor that he has taken oath, or given bond; nor need the number of votes be stated, if the relator is stated to have the plurality.² The people need not allege defendant's election and inability to hold office, but simply that he has intruded into office unlawfully.³ It is not necessary to set forth in the complaint the grounds of defect, in defendant's claim to office. It is enough to aver that he unlawfully exercises the office, and to call upon him to set up and show his title, if he has any. Every man who exercises an office, must be ready to show his authority whenever the people, in the appropriate manner, demand to know it.⁴

An action, brought as prescribed in this article, is triable, of course and of right, by a jury, in like manner as if it was an action specified in section 968 of this act, and without procuring an order, as prescribed in section 970 of this act.⁵

An action to try title to public office is one of legal, not equitable cognizance, and the issues therein are strictly legal and triable by jury.⁶ Nor is the right to trial by jury lost by uniting other equitable causes of action.⁷

Where final judgment is rendered, upon the right and in favor of the person so alleged to be entitled, he may, after taking the oath of office, and giving an official

¹ Code Civ. Pro., § 1949.

² 12 N. Y., 433.

³ 33 Hun, 236.

⁴ 10 N. Y. St. Rep., 717.

⁵ Code Civ. Pro., § 1950.

⁶ 57 N. Y., 151.

⁷ 66 N. Y., 237.

bond, as prescribed by law, take upon himself the execution of the office. He must, immediately thereafter, demand of the defendant in the action, delivery of all the books and papers in the custody, or under the control, of the defendant, belonging to the office from which the defendant has been so excluded.¹

Upon the rendition of a regular judgment of ouster against an officer, and in favor of the claimant, the officer becomes ousted, and the party declared to be entitled, upon taking the official oath, and filing bonds, if required, becomes *eo instanti* invested with the office.²

If the defendant refuses or neglects to deliver any of the books or papers, demanded as prescribed in the last section, he is guilty of a misdemeanor; and the same proceedings must be taken, to compel the delivery thereof, as are now or shall hereafter be prescribed by law, where a person, who has held an office, refuses or neglects to deliver the official books or papers to his successor.³

No proceedings can be had to compel the delivery of books and papers belonging or appertaining to a public office, until a judgment of ouster has been regularly entered against the person executing the duties of the office. An allegation, in a petition for an order to compel such delivery, that judgment was rendered and duly perfected in an action in the nature of a *quo warranto* brought by the people, to try the right of an individual to an office, on such a day; without stating in what court the judgment was rendered, or whether under the direction of a single judge, or at a special term or a general term, is not sufficient, if the facts are denied.⁴

The application for books is not a motion in the Supreme Court, but one to a justice out of court, and any justice has jurisdiction.⁵ Although the application for

¹ Code Civ. Pro., § 1951.

² 6 Abb. 220; 7 How., 282; 59 How., 106.

³ Code Civ. Pro., § 1952.

⁴ 14 Barb., 396.

⁵ 7 How., 282.

the delivery of books may involve the question of the title to office, it is still maintainable. In this respect it is consistent with *quo warranto*,¹ but it is only applicable when the title is clear and free from reasonable doubt.² The order should be made only in favor of one actually in possession and when his title is clear.³ The justice before whom the proceedings are pending to obtain the delivery of books and paper pertaining to the office, must examine the question of the title of the respective claimants to the office, so far as to enable him to determine properly the question to be submitted.⁴ An appeal from a judgment of ouster cannot in any way act as a stay of proceedings.⁵

Where final judgment has been rendered, upon the right and in favor of the person so alleged to be entitled, he may recover, by action, against the defendant, the damages which he has sustained, in consequences of the defendant's usurpation, intrusion into, unlawful holding, or exercise of the office.⁶

In an action in the nature of a *quo warranto* brought against a number of defendants, where the court has no power to adjust the ultimate rights of the defendants in the subject of the action, it cannot compel a part of the defendants to pay costs to the other defendants.⁷

Where two or more persons claim to be entitled to the same office or franchise, the attorney-general may bring the action against all, to determine their respective rights thereto.⁸

In an action, brought as prescribed in subdivision third of section 1948 of this act, the final judgment, in favor

¹ 9 How., 414.

² 11 How., 418.

³ 5 Abb., 73.

⁴ 42 Barb., 208.

⁵ 7 How., 282.

⁶ Code Civ. Pro., § 1953.

⁷ 5 Lans., 25.

⁸ Code Civ. Pro., § 1954.

of the plaintiff, must perpetually restrain the defendant or defendants, from the commission or continuance of the act or acts complained of. A temporary injunction to restrain the commission or continuance thereof, may be granted, upon proof, by affidavit, that the defendant or defendants enjoined have acted as a corporation, within the State, without being duly incorporated, or have usurped, exercised, or claimed, within the State, a franchise, liberty, or corporate right, not granted to them by law. The provisions of title second of chapter seventh of this act apply to such a temporary injunction, and the proceedings thereupon, except where special provision is otherwise made in this title. For that purpose, the injunction order is deemed to have been granted as prescribed in section 603 of this act.

In any other action, brought as prescribed in this article, where a defendant is adjudged to be guilty of usurping or intruding into, or unlawfully holding or exercising, an office, franchise, or privilege, final judgment must be rendered, ousting and excluding him therefrom, and in favor of the people or the relator, as the case requires, for the costs of the action. As a part of the final judgment, the court may, in its discretion, also award, that the defendant, or, where there are two or more defendants, that one or more of them, pay to the people a fine, not exceeding two thousand dollars. The judgment for the fine may be docketed, and execution may be issued thereupon, in favor of the people, as if it had been rendered in an action to recover the fine. The fine, when collected, must be paid into the treasury of the State.¹

Action to vacate a patent.

The attorney-general may maintain an action to vacate or annul letters patent, granted by the people of the State, in either of the following cases:

1. Where they were obtained by means of a fraudulent

¹ Code Civ. Pro., § 1956; 6 Abb., 220; 73 N. Y., 535; 26 How., 213; 52 N. Y., 576.

suggestion, or concealment of a material fact, made by or with the knowledge or consent of the person to whom they were issued.

2. Where they were issued in ignorance of a material fact, or through mistake.

3. Where the patentee, or those claiming under him, have done or omitted an act, in violation of the terms and conditions upon which the letters patent were granted, or have, by any other means, forfeited the interest acquired under the same.

Whenever the attorney-general has good reason to believe that any act or omission, specified in this section, can be proved, and that the person to be made defendant has no sufficient legal defense, he must commence such an action.¹

This section is limited to letters patent granted by the people, and does not extend to letters granted by the king, prior to the revolution. Where letters patent are sought to be vacated on the ground that they were granted on false suggestions, it must appear that the suggestions were material. The people are liable to pay costs if they fail in an action to declare letters patent void.²

An action brought as prescribed in this article, is triable, of course and of right, by a jury, as if it was an action specified in section 968 of this act, and without procuring an order, as prescribed in section 970 of this act.³

Where final judgment, vacating or annulling letters patent, is rendered in an action, brought as prescribed in the last section, the attorney-general must cause a copy of the judgment roll to be forthwith filed in the office of the secretary of State, who must make an entry, in the records of the commissioners of the land office, stating the substance and effect of the judgment, and the time

¹ Code Civ. Pro., § 1957.

² 10 Barb., 120; affirmed, 9 N. Y., 349.

³ Code Civ. Pro., § 1958.

when the judgment-roll was filed. The real property granted by the letters patent may thereafter be disposed of by the commissioners of the land office, as if the letters patent had not been issued.¹

Immediately after making the entry prescribed in the last section, the secretary of State must transmit a certified transcript thereof to the clerk, or the register, as the case requires, of each county in which the real property affected by the judgment is situated. The clerk or register must file it; and, if the letters patent are recorded in his office, he must note the contents of the transcript in the margin of the record.²

Miscellaneous Provisions.

When actions brought in name of people.—An action, brought as prescribed in this title, except an action to recover a penalty or forfeiture, expressly given by law to a particular officer, must be brought in the name of the people of the State; and the proceedings therein are the same, as in an action by a private person, except as otherwise specially prescribed in this title.³

Where a judgment is rendered, or a final order is made against the people, in a civil action brought, or special proceeding instituted in their name by a public officer, pursuant to a provision of law, it must be to the same effect and in the same form as against a private individual who brings a like action, or institutes a like special proceeding, except as otherwise specially prescribed by law. But an execution shall not be issued against the people.⁴

Relator joined as plaintiff; compensation to attorney-general.—Where an action is brought by the attorney-general, as prescribed in this title, on the relation or information of a person, having an interest in the ques-

¹ Code Civ. Pro., § 1959.

² Code Civ. Pro., § 1960.

³ Code Civ. Pro., § 1984.

⁴ Code Civ. Pro., § 1985.

tion, the complaint must allege, and the title of the action must show, that the action is brought upon the relation of that person. In such a case, the attorney-general must, as a condition of bringing the action, require the relator to give satisfactory security to indemnify the people, against the costs and expenses thereof. Where security is so given, the attorney-general is entitled to compensation for his services, to be paid the relator, in like manner as the attorney and counsel for a private person.¹ The provision which entitles the attorney-general to compensation for his services, to be paid by the relator, is unconstitutional.²

Joinder of causes.—Where two or more causes of action exist, in favor of the people, against the same person, for money due upon, or damages for the non-performance of, one or more contracts of the same nature, the attorney-general must join all those causes in one action.³

Consolidation of action—Where two or more actions, brought in behalf of the people, upon the same mortgage or other contract, are pending against separate defendants, claiming or defending under the same title the attorney-general must, upon the request of the defendants, cause them to be consolidated into one action; and only one bill of costs can be taxed against the defendants.⁴

No security by people or municipal corporations.—Each provision of this act, requiring a party to give security, for the purpose of procuring an order of arrest, an injunction order, or a warrant of attachment, or as a condition of obtaining any other relief, or taking any proceeding; or allowing the court, or a judge, to require such security to be given; is to be construed, as excluding an action brought by the people of the State, or by

¹ Code Civ. Pro., § 1986.

² 2 McC., 295.

³ Code Civ. Pro., § 1988.

⁴ Code Civ. Pro. § 1989.

a domestic municipal corporation; or by a public officer, in behalf of the people, or of such a corporation; except where the security, to be given in such an action, is specially regulated by the provision in question.¹

¹ Code Civ. Pro., § 1990.

APPENDIX OF FORMS.

MANDAMUS.

No. 1.

Affidavit on Application for Mandamus.

(Code Civil Procedure, § 2067.)

Ante p. 15.

STATE OF NEW YORK, }
County of Delaware, } ss.:

Thomas Niles of —, in said county, being duly sworn, says (here set forth all the facts precisely but briefly, entitling relator to writ, *ante* pp. 15-19)

THOMAS NILES.

Subscribed and sworn to before me, }
this 2d day of October, 1890. }

RICHARD STILES,
Notary Public, Delaware County, N. Y.

No. 2.

Notice of Motion for Mandamus.

(Code Civil Procedure, §§ 2067-2069.)

Ante pp. 15-17.

To Henry Durk, Esq.:

SIR—Take notice that upon an affidavit, with a copy of which you are herewith served, I shall move the Supreme Court, at the next special term thereof (or general term, Code Civil Procedure, § 2069), to be held at the court house in the city of Buffalo, on the 19th day of

October, 1890, at the opening of the court or as soon thereafter as counsel can be heard, for an order that a writ of *mandamus*, under the seal of the court, issue therefrom, directed to and commanding you to (state the action to be taken or relief granted), or for such other or further relief as may be just in the premises.

Yours, etc.,

WILLIAM DAY,
Attorney for Relator.

Office and post-office address, Altamont, N. Y.

No. 3.

Order to Show Cause why Mandamus should not Issue.

(Code Civil Procedure, § 2067.)

Ante, p. 13.

At a special term of the Supreme Court, held at the court house in the city of Buffalo, on the 19th day of October, 1890.

Present—Hon. A. M. OSBORNE, *Justice*.

THE PEOPLE OF THE STATE OF NEW YORK <i>ex rel.</i> DAVID MIX	}
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against

THE PRESIDENT AND TRUSTEES OF THE VILLAGE OF ELMA.	}
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On reading and filing the affidavit of David Mix, relator above named, dated the 2d day of October, 1890, and on motion of William Day, relator's counsel (after hearing Martin Wilkins, in opposition thereto), it is

Ordered, That the president and trustees of the said village of Elma, show cause before this court, at the next special term thereof, to be held at the court house in the city of Buffalo, on the 23d day of November, 1890, why they, the said president and trustees, do not (grant the relief prayed for), or why they should not be

compelled to so act forthwith, or why an alternative mandamus in the usual form should not issue to them, requiring them to so act.

Let a copy of this order, and of the affidavit upon which it was granted, be served on each of said defendants, on or before the —— day of November, 1890.

Dated *October 19*, 1890.

A. M. OSBORNE,
Justice Supreme Court.

No. 4.

Order Granting Alternative Mandamus.

(Code Civil Procedure, §§ 2067, 2070.)

Ante, p. 18.

At a special term of the Supreme Court, held at the court house in the city of Buffalo, on the 23d day of November, 1890.

Present—Hon. C. R. INGALLS, *Justice.*

THE PEOPLE OF THE STATE OF NEW
YORK *ex rel.* DAVID MIX

against

THE PRESIDENT AND TRUSTEES OF
THE VILLAGE OF ELMA.

On reading and filing the affidavit of David Mix, the relator above named, dated the 2d day of October, 1890, and on motion of William Day, Esq., of counsel for relator (after hearing Peter A. Carr, Esq., in opposition thereto), it is

Ordered, That an alternative mandamus issue out of and under the seal of this court, directed to the said president and trustees of the village of Elma, commanding them forthwith (set forth what the writ commands defendants to do); or that the said defendants show cause

to the contrary, before this court, at the next special term thereof, to be held at the court house in the city of Buffalo, on the 22d day of December, 1890.

Dated *November 23d*, 1890.

C. R. INGALLS,
Justice Supreme Court.

No. 5.

Alternative Mandamus.

(Code of Civil Procedure, §§ 2067, 2069, 2082).

Ante, p. 18.

In the name of the People of the State of New York to George D. Williamson, Peter Long and John Hawkes, greeting:

Whereas (set forth all the facts briefly and concisely), Nevertheless you have unjustly refused to (state the act or omission complained of), as appears to us by the affidavit of Henry H. Jones, relator herein.

Now, therefore, we desiring that speedy justice shall be done in the premises, to the said Henry H. Jones, relator herein, do, therefore, command you, that immediately upon the service upon you of this writ, you do (grant the relief demanded, in manner as set forth in the order granting the writ), or that you show cause to the contrary thereof, before our Supreme Court, and that you make return to this writ, within twenty days after service thereof upon, at the office of the clerk of this court at the city of Albany (or to the clerk of Albany county [C. C. P., § 2072.]).

Witness, Hon. WILLIAM L. LEARNED, Justice of
[L. s.] the Supreme Court, at the court house in the
city of Albany, on the 12th day of April, 1890.

ANSEL C. REQUA.

Clerk.

N. B. SPAULDING,
Attorney for the Relator.

No. 6.

Order Granting Peremptory Mandamus.

(Code Civil Procedure, §§ 2067, 2070.)

Ante, p. 13.

At a special term of the Supreme Court, held at the court-house in the city of Buffalo, on the 22d day of December, 1890.

Present—Hon. C. R. INGALLS, *Justice*.

THE PEOPLE OF THE STATE OF NEW
YORK *ex rel.* DAVID MIX,

against

THE PRESIDENT AND TRUSTEES OF
THE VILLAGE OF ELMA.

On reading and filing the affidavit of David Mix, the relator above-named, dated the 2d day of October, 1890, and upon the return of the order heretofore granted at a special term of this court, held at the court house in the city of Buffalo, on the 23d day of November, 1890, before Hon. C. R. Ingalls, Justice, requiring the president and trustees of said village of Elma to (state relief asked), or, that they show cause why they do not at this time and place, and the said parties appearing and answering thereto by Mark A. Cadwell, their counsel, and not denying their allegations contained in the affidavit of David Mix, the relator above named, dated the 2d day of October, 1890; now, on motion of William Day, Esq., counsel for said relator, it is

Ordered, that a peremptory writ of mandamus forthwith issue out of and under the seal of this court, directed to the said president and trustees of said village of Elma, requiring them to (grant relief asked).

C. R. INGALLS,

Justice Supreme Court.

No. 7.

Peremptory Mandamus.

(Code of Civil Procedure, §§ 2067-2090.)

Ante, p. 18.

The People of the State of New York [upon the relation of David Mix] to the President and Trustees of the Village of Elma, greeting :

WHEREAS (set forth all the facts in brief, including the fact that an order to show cause has been granted, and omission to grant relief asked for, or that the applicant's right to mandamus depends only upon questions of law, and notice of application has been given to the parties intended), as clearly appears to us by the annexed affidavit of David Mix:

Now, therefore, that justice may at once be done to said relator, we command you, that, immediately upon the service upon you of this writ. you, the said (defendants) do forthwith (grant the relief asked, in the terms set forth in order granting writ), lest complaint shall again come to us by your default, and in what manner this, our command, shall be executed, make to appear to our said Supreme Court, at a special term thereof, on the 25th day of January, 1891, at the court house in the city of Buffalo, there and then returning this our writ.

Witness, the Hon. C. R. INGALLS, Justice of our
[L. S.] said court, at the court house in the city of
Buffalo, this 22d day of December, A. D., 1890.

CHARLES A. ORR, *Clerk.*

WILLIAM DAY,

Attorney for Relator.

No. 8.

Return of Compliance with Writ of Mandamus.

(Code of Civil Procedure, §§ 2073, 2074.)

Ante, p. 25.

(Title.)

The return of the defendants to the peremptory writ

of mandamus granted herein, on the 22d day of December, 1890, shows to the court that we have (state duty required), as commanded in said writ.

In witness whereof, we have hereunto affixed our signatures, this 25th day of January, 1890.

(Signed by all Defendants.)

MARK A. CADWELL,
Attorney for Defendants.

No. 9.

Return or Demurrer to Mandamus.

(Code of Civil Procedure, §§ 1994, 2078, 2074, 2076, 2077.)

Ante, p. 22.

(Title.)

The defendants above named, for a return to the alternative writ of mandamus issued herein, a copy of which is hereto annexed, make answer (as in an answer to complaint).

EDWIN D. HOWE,
Attorney for Defendants.

Or,

(Title.)

The defendants above named demur to the alternative writ of mandamus herein, a copy of which is hereto annexed, on the ground (as in demurrer to complaint).

WM. A. PARSHALL,
Attorney for Defendants.

No. 10.

Notice of Filing Return and Demurrer.

(Code of Civil Procedure, § 2081.)

Ante, p. 25.

(Title.)

To CHARLES O. PRATT, Esq.,
Attorney for Relator.

SIR.—Take notice, that a return to an alternative writ

of mandamus, issued against Paul A. Wheeler, defendant herein, was, on the 6th day of March, 1889, filed in the office of the clerk of this court (or in the office of the clerk of ——— county), and that you are required to demur or plead to the said return within twenty days after the service of this notice.

PETER A. DELANEY,

Attorney for Defendant.

(Office and P. O. address.)

No. 11.

Notice of Motion to Quash Writ.

(Code of Civil Procedure, § 2075.)

Ante, p. 22.

To WM. B. TEN EYCK, Esq.,

Attorney for Relator :

SIR.—Please take notice, that this court will be moved at a special term thereof, to be held at the court house in the city of Utica, on the 27th day of May, 1889, at the opening of the court on that day, for an order quashing and setting aside the alternative writ of mandamus, herein granted April 30, 1889, or for such other or further relief as to the court may seem just.

Yours, etc.,

WM. S. DYER,

Attorney for Defendant.

No. 12.

Form of Judgment.

(Code of Civil Procedure, § 2082.)

Ante, p. 31.

(*Title.*)

A peremptory writ of mandamus having issued out of this court after due notice to the defendants above named, on order of special term, granted February 24, 1890, in and by which these defendants were commanded to (here state thing required to be done), and granting forty dol-

lars costs and his disbursements to the relator, and the defendants having made and filed the certificate required by such order and writ, and the return thereto: Now, on motion of H. C. Mandeville, attorney for relator, it is adjudged that (here set forth what is adjudged).

It is further adjudged, that the relator recover of the defendants, John P. Smart, Patrick H. Reilly and Harry S. Jones, the sum of seventy dollars costs and disbursements, and have execution therefor.

ANSEL C. REQUA, *Clerk.*

No. 13.

Order Staying Proceedings, Pending Appeal.

(Code of Civil Procedure, § 2089).

Ante, p. 33.

(*Title.*)

An application having been this day made for a writ of *mandamus*, directing (here state relief asked), and the same having been granted by order of the court, after hearing Henry K. Cowen for the motion, and Charles N. Palmer opposed, and it appearing that the defendant is about taking an appeal from said order. Now, on motion of defendant's counsel, it is ordered that all proceedings on said writ be stayed until the expiration of the time to appeal from said order, and in case such appeal is taken, then that all proceedings thereon be stayed till the hearing and determination of said appeal.

Enter in Albany county.

WM. L. LEARNED,
Justice Supreme Court.

No. 14.

Notice of Appeal from Order Granting Mandamus.

(Code of Civil Procedure, § 2089.)

Ante, p. 33.

(*Title.*)

Please take notice, that John H. Day, Peter Wagner

and Henry Smith, defendants herein, appeal to the general term of this court from the order made in the above-entitled proceedings by this court at a special term thereof, held at city hall in the city of Albany, on the 20th day of December, 1889, and that the appellants intend to bring up for review, upon such appeal, so much of the order made as directs that (here state part of order appealed from.

Yours, etc.,

PAUL F. DUKE,

Attorney for Appellants.

(Office and P. O. Address.)

To FRANK H. JENNISON, Esq.,

*Attorney for Relator, Respondent, and
the County Clerk of the county of Al-
bany.*

WRIT OF PROHIBITION.

No. 15.

Affidavit on Application for Writ of Prohibition.

(Code of Civil Procedure, § 2091.)

Ante, p. 100.

(Substantially the same as Form No. 1.)

No. 16.

Notice of Motion for Writ of Prohibition.

(Code of Civil Procedure, §§ 2091, 2092.)

Ante, p. 100.

To the ——— Court [or to Hon. ———, Judge of ——— Court], and to John Stiles :

SIR.—Take notice, that, on an affidavit, with a copy of which you are herewith served, I shall move the ——— court, at the next special term thereof (or general term, C. C. P., § 2095), to be held at the court house, in the city of Hudson, on the 26th day of March, 1890, at the opening of the court, or as soon thereafter as counsel can be heard, for an order that a writ [*or an alternative writ*] of prohibition, under the seal of the court, issue therefrom, directed to and commanding you [state requirements of writ], and for such other and further relief as may be just in the premises.

Yours, etc.,

N. B. SPALDING,

Attorney for Relator.

(Office and P. O. address.)

To JOHN STILES, Esq.

No. 17.

Order Granting Alternative Writ of Prohibition.

(Code of Civil Procedure, §§ 2091, 2092.)

Ante, p. 102.

At a special term of the Supreme Court, held at the court house, in the city of Hudson, on the 26th day of March, 1890.

Present—Hon. SAMUEL EDWARDS, *Justice*.

THE PEOPLE OF THE STATE OF NEW
YORK *ex rel.* HENRY T. JONES

against

TO THE ——— COURT [OR TO HON.
——, JUDGE OF ——— COURT], AND
TO JOHN STILES.

On reading and filing the affidavit of Henry T. Jones, the relator above named, dated February 23, 1890, and on motion of N. B. Spalding, Esq., counsel for relator (after hearing Edwin D. Howe, Esq., in opposition thereto), it is

Ordered, That an alternative writ of prohibition issue out of and under the seal of this court, directed to the ——— court [or to Hon. ———, judge of ——— court], and to the said John Stiles, commanding them to desist and refrain from any further proceedings in (state matter to be prohibited), until the further direction of this court, and let the (defendants) show cause before this court, at the next special term thereof, to be held at the court house in the city of Hudson, on the 29th day of April, 1890, why they should not be absolutely restrained from any further proceedings in (that action, special proceedings or matter).

SAMUEL EDWARDS,
Justice Supreme Court.

NO. 18.

Alternative Writ of Prohibition.

(Code of Civil Procedure, §§ 2094, 2095.)

Ante, p. 100.

The People of the State of New York [on the relation of Henry L. Jones], to the ——— Court [or to Hon. ———, Judge of ——— Court], and to John Stiles, greeting:

WHEREAS, Henry L. Jones, at a special term of our court, held at the court house in the city of Hudson, on the 26th day of March, 1890, by his affidavit, dated the 23d day of February, 1890, there presented, made known to this court that [state the grievance complained of; but it is not necessary to state the facts or legal objections upon which the relator founds his claim for relief]: Now, therefore, that justice may be done in the premises, and it appearing that adequate relief can only be had by writ of prohibition, restraining you and each of you from taking any further proceedings in the matter hereinbefore set forth, we, therefore, command you, the said court of ——— [or the said Hon. ———, judge of ——— court], and the said John Stiles, to desist and refrain from any further (as in order) until further direction of this court; and also to show cause before this court (upon the first day of a future term, specifying it, at which application for the writ might have been made), why you should not be absolutely restrained from any further proceedings in the (action, special proceeding or matter).

Witness, the Hon. Samuel Edwards, one of the justices of the Supreme Court, at the court
[L. s.] house in the city of Hudson, this 29th day of April, 1890.

By the court.

ISAAC P. ROCKEFELLER,

Clerk.

N. B. SPALDING,

Attorney for Relator.

Allowed this 29th day of April, 1890.

SAMUEL EDWARDS,

Justice Supreme Court.

—
No. 19.

Return to Alternative Writ of Prohibition.

(Code of Civil Procedure, §§ 2095-2098.)

Aate, p. 103.

(*Title.*)

The said — Court (or the said —, judge of — Court, held in and for, etc. [or —, justice, etc.], to whom the annexed writ of prohibition was issued, for answer to the said writ, makes the following return (give a full account of the proceedings had by the court).

In witness whereof, I have caused the seal of said [L. S.] court to be hereunto affixed, this — day of —, 18—.

By the court.

W. H. D.,
Clerk.

Or,

(*Title.*)

I, John Stiles, the party to whom the writ of prohibition, a copy of which is hereto annexed, is directed, deny all and all manner of grievance in said writ alleged, and certify and return to the Supreme Court (insert here the facts, or adopt the return of the court or judge), and rely upon the matters hereinbefore set forth (or upon the matter therein contained), as sufficient cause why the said court (or judge, etc.), should not be restrained, as mentioned in said writ.

Witness my hand, this 18th day of June, 1890.

JOHN STILES.

(Verification.)

No. 20.

Final Order for Absolute Writ of Prohibition, or Against the Relator.

(Code Civil Procedure, § 2100.)

Ante, p. 104.

At a special term of the Supreme Court held at the court house in the city of Hudson, on the 20th day of June, 1890.

Present—Hon. SAMUEL EDWARDS, *Justice*.

THE PEOPLE OF THE STATE OF NEW YORK <i>ex rel.</i> HENRY T. JONES, <i>against</i> TO THE ——— COURT [OR, TO HON. ———, JUDGE ——— COURT], AND TO JOHN STILES.	}
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It appearing to this court that an alternative writ of prohibition was on the 26th day of March, 1890, issued in the above entitled matter pursuant to the order of this court herein, dated on the 26th day of March, 1890, returnable at, etc., directed to the ——— court [or, to Hon. ———, Judge of the ——— court], and to John Stiles, commanding that [recite the directions of the writ], and said writ having been duly served on (the defendants), and no return having been made, as required, to said court (*or*, if return has been made set it forth, and the action taken on it). Now, on reading and filing due proof of service of said writ on all parties defendant, on the writ and return (and all the other papers, naming them), and having heard N. B. Spaulding, Esq., of counsel for relator (and Edwin D. Howe, Esq., of counsel for defendants), and due deliberation having been had thereon, on motion of * N. B. Spaulding, for relator, it is

Ordered, That an absolute writ of prohibition issue herein, out of and under the seal of this court, commanding the said (defendants), to desist and refrain from any further proceedings in the said action (or special pro-

ceeding or matter), and that all proceedings (or specify proceedings), hereafter taken in the action (or special proceedings or matter), be vacated and annulled, and that the said defendants, John Stiles, pay to the said relator, Henry T. Jones, the sum of _____ dollars, costs and disbursements of this proceedings.

SAMUEL EDWARDS,

Justice Supreme Court.

*Or, [from the *]*

Ordered, That the said court (or judge), and John Stiles, defendants herein, are authorized to proceed in the action (special proceedings or matter), as if the alternative writ had not been issued), and that the said relator, Henry T. Jones, pay to the defendant, John Stiles, the sum of _____ dollars, costs and disbursements of this proceeding.

No. 21.

Absolute Writ of Prohibition.

(Code Civ. Procedure, § 2100.)

Ante, p. 100.

As in Form No. 17, except that the terms of the final order are to be embodied in it instead of order to show cause.

APPENDIX OF FORMS.

HABEAS CORPUS.

No. 22.

Application for Writ of Habeas Corpus to testify.

(Code of Civil Procedure, §§ 2011, 2012.)

Ante, p. 145.

To Hon. ———.

The petition of John Doe respectfully shows that a certain action (or special proceeding) is now on trial before the court, sitting at ——— (or before Hon. ———, justice of the court, at ———). That said action is entitled John Doe against Richard Roe, and is in the nature of ———.

That the testimony of one Richard Stiles is material and necessary to this applicant, on the trial of said action (or the hearing of said special proceeding), as this deponent is advised by his counsel, Paul Hawkins, of Waverly, N. Y., and verily believes.

That said Richard Stiles is confined at the county jail at Hudson, N. Y.

That said Richard Stiles is not confined in said jail, under a sentence of death, or under any other sentence for a felony.

Wherefore, your petitioner prays that a writ of *habeas corpus* issue to (the person in whose charge said prisoner may be), commanding him that he have the body of said Richard Stiles, by him imprisoned and detained, before (the court or judge), at the ——— (place of trial) ———, on the 18th day of May, 1889.

Dated VALATIE, N. Y., *May* 3, 1889.

JOHN DOE.

PAUL HAWKINS,

Attorney for Petitioner.

STATE OF NEW YORK, }
 County of Columbia, } ss. :

John Doe, being duly sworn, says, that he has heard read the foregoing petition, and knows the contents thereof, and believes it to be true.

JOHN DOE.

Subscribed and sworn to before me, }
 this 3d day of May, 1889. }

PETER DAY,

Notary Public, Columbia Co.

No. 23.

Writ of Habeas Corpus to testify.

(Code of Civil Procedure, §§ 2008-2014.)

Ante, p. 145.

The People of the State of New York on the relation of John Doe.

To JOHN M. FELTS, Sheriff of Columbia County :

We command you that you have the body of [L. s.] Richard Stiles, by you imprisoned and detained, as it is said, at Hudson, N. Y., at our ——— court (or before H. D., referee), at a term thereof (or hearing), to be held at the court house, in the city of Hudson, on the 18th day of May, 1889, then and there to testify as a witness in a certain action (or proceeding) now pending therein; and that you safely return him to said (place of detention) immediately upon the conclusion of his testimony in said action (or hearing), and have you then and there this writ.

Witness Hon. ———, one of the ——— court of ———, the 3d day of May, 1889.

ISRAEL P. ROCKEFELLER,

Clerk.

PAUL HAWKINS,

Attorney for Petitioner.

Allowed this 3d day of May, 1889, on application of John Doe; and said John Doe is hereby ordered to pay to John M. Felts, sheriff, —— dollars, charges. for bringing up said Richard Stiles.

SAMUEL EDWARDS,

Justice Supreme Court.

Habeas Corpus or Certiorari to Inquire into Cause of Detention.

No. 24.

Petition for Writ of Habeas Corpus, or of Certiorari, to Inquire into Cause of Detention.

(Code of Civil Procedure, § 2019.)

Ante, p. 115.

To Hon. GEORGE S. WEED, *County Judge of Clinton County*:

The petition of David Gage respectfully shows that he is now a prisoner in the custody of J. B. White, in the county jail of Clinton county, at Plattsburgh, N. Y.

That he has not been committed, nor is he detained by virtue of a mandate, issued by a court or judge of the United States, in a case where such courts or judges have exclusive jurisdiction under the laws of the United States, or have acquired exclusive jurisdiction by the commencement of legal proceedings in such a court.

That he is not committed or detained by virtue of a final judgment or decree of a competent tribunal of civil or criminal jurisdiction, or the final order of such a tribunal, made in a special proceeding, instituted for any cause (except to punish for a contempt), or by virtue of an execution or other process, issued upon such a judgment, decree or final order.

That the cause or pretense of the imprisonment or restraint, according to the best knowledge and belief of your petitioner, is (state the alleged cause of detention); and that the same is illegal, as he is advised by his counsel, and as he verily believes.

(If imprisonment is by virtue of a mandate, annex it, or aver a demand for it, with tender of legal fees, and a refusal to deliver copy.)†

Wherefore, your petitioner prays that a writ of *habeas corpus* (or *certiorari*) issue, directed to J. B. White, commanding him that he have the body of said David Gage, by him imprisoned and detained, together with the cause of such imprisonment and detention, before Hon. George S. Weed, county judge of Clinton county, at the court house in the village of Plattsburgh, on the 14th day of September, 1890.

Dated PLATTSBURGH, N. Y., *Sept.* 10, 1890.

DAVID GAGE.

STATE OF NEW YORK, }
County of Clinton, } ss. :

David Gage, being duly sworn, says, that he has heard read the foregoing petition, and knows the contents thereof, and that he believes it to be true.

DAVID GAGE.

Subscribed and sworn to before me, }
this 10th day of September, 1890. }

HENRY PETERS,

Notary Public, Clinton Co.

No. 25.

Affidavit when Application is made in another County.

(Code of Civil Procedure, §§ 2017, 2018, 2021)

Ante, p. 116.

STATE OF NEW YORK, }
County of Essex, } ss. :

Richard Stiles, being duly sworn, says, that he is the applicant that verifies the annexed petition for a writ of *habeas corpus* (or *certiorari*). That there is no special or general term of the Supreme Court now setting in the judicial district (naming the district which includes the county in which prisoner is confined). That there is no officers authorized to perform the duties of justice of the Supreme Court at Chambers, now within the (county where prisoner is detained), or,

That the only officer within the county of ———, authorized to grant said writ, is the Hon. ———, who is incapable of acting by reason of (set forth the cause of incapacity, specially).

RICHARD STILES,

Subscribed and sworn to before me, }
this 18th day of May, 1890. }

JOHN H. CAREY,
Notary Public, Essex County.

No. 26.

Writ of Habeas Corpus.

(Code of Civil Procedure, § 2021).

Ante, p. 118.

"The People of the State of New York, to the Sheriff of," etc. [or "to A. B."]:

"We command you, that you have the body of C. D., by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatever name the said C. D. is called or charged, before ———," ["the Supreme Court at a special" (or "general") "term thereof, to be held," or "E. F., Justice of the Supreme Court," or otherwise, as the case may be], "at ———, on ———," [or "immediately after the receipt of this writ,"] "to do and receive what shall then and there be considered, concerning the said C. D. And have you then there this writ.

"Witness, ———, one of the justices" (or "judges") "of the said court," [or "county judge," or otherwise, as the case may be],
[L. s.] "the ——— day of ———, in the year eighteen hundred and ———."

No. 27.

Writ of Certiorari to Inquire into Cause of Detention.

(Code of Civil Procedure, § 2022).

Ante, p. 154.

"*The People of the State of New York, to the Sheriff of,*" etc. [or "*to A. B.*"]:

"We command you, that you certify fully and at large, to ————" ["the Supreme Court, at a special" (or "general") "term thereof, to be held," or "E. F., justice of Supreme Court," or otherwise, as the case may be], "at ———, on ———" [or "immediately after the receipt of this writ"] "the day and cause of the imprisonment of C. D., by you detained, as it is said, by whatsoever name the said C. D. is called or charged. And have you then there this writ.

"Witness, ———, one of the justices" (or "judges") "of the said court" [or "county [L. s.] judge," or otherwise, as the case may be], the ——— day of ———, in the year eighteen hundred and ———."

No. 28.

Undertaking on Writ of Habeas Corpus.

(Code of Civil Procedure, § 2000.)

WHEREAS, a writ of *habeas corpus* has been issued by Hon. John C. Nott, county judge of Albany county, by which John W. Hart, sheriff of Albany county, is commanded to have the body of John Stiles before him, at his chambers in the city of Albany, in said county, on the 8th day of March, 1888, at three o'clock in the afternoon, to do and receive what then and there shall be considered concerning said John Stiles: Now, therefore, I (or we), Henry R. Peck, banker, of the said city of Albany, in the said county of Albany (and John H. Martin, merchant, of said city and county), do hereby (jointly and severally) undertake, in the sum of \$1,200, to pay to

said John W. Hart, all charges of carrying back such prisoner if he shall be remanded, and that such prisoner shall not escape by the way, either in going to, remaining at, or returning from the place to which he is to be taken.

HENRY R. PECK. [L. s.]

No. 29.

Return to Writ of Habeas Corpus or Certiorari.

(Code of Civil Procedure, § 2026.)

Ante, p. 123.

To the Supreme Court of the State of New York :

The return of John W. Hart, sheriff of Albany county, to the annexed writ of *habeas corpus* (or *certiorari*).

As commanded by the annexed writ, I hereby make return thereto, as follows:

At the time when said writ was served upon me, viz.: the 18th day of May, 1888, the said Peter Downer, therein named, was in my custody as sheriff, and confined in the county jail of Albany county, under and by virtue of (here state authority, setting forth at length the cause of detention; if by written authority, annex a copy and produce the original), and that said Peter Downer is still in my custody, and * here now had before this court, as by said writ commanded.

Or,

That previous to the service upon me of the annexed writ, and on the 2d day of May, 1888, I had the said Peter Downer, therein named, in my custody, confined by virtue of (setting at length the cause of his detention); but that on the ——— day of ———, 1888, I transferred him to the custody of Henry Williams, sheriff of Erie county, under and by virtue of an order of the Hon. Judson S. Landon, justice of the Supreme Court. That I so held him by virtue of a mandate (setting forth its substance), the original of which is no longer in my possession, on account of which I cannot produce said Peter Downer, as commanded in said writ.

Or, at * said Peter Donner is so sick or infirm, that the production of him here would endanger his life or his health. (§ 2027).

All of which I respectfully certify to this honorable court.

Dated Albany, *May* 18, 1881.

JOHN W. HART.

STATE OF NEW YORK, }
County of ———, }

J. W. Hart, being duly sworn, says, that the above return, subscribed by him is true of his own knowledge, except as to those matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

J. W. HART.

Subscribed and sworn to before me, }
this — day of ———, 1889. }

Notary Public, Albany County.

No. 30.

Warrant of Attachment for Disobeying Writ.

(Code Civil Procedure, § 2028.)

Ante, p. 122.

The People of the State of New York, to the Sheriff of any county in the State of New York, where the said ——— may be found [or the coroner of the county of ———], [or John Doe, who is hereby especially appointed and designated to execute this warrant], greeting:

Whereas, Due proof having been made, that on the —th day of ———, 1883, a writ of *habeas corpus*, (or *certiorari*), was issued out of this court, directed to said John W. Hart, commanding him to bring the body of one, Peter Donner, by him imprisoned and detained, together with the time and cause of such imprisonment, before this court at a special term thereof, to be held at the court house in the — of ———, on the — day of ———, 1889, and further proof being made that

said writ was duly served on the said ———, on the ——— day of ———, 1889, and further proof being made that in defiance of the command of this court in said writ contained, said John W. Hart has refused or neglected, without sufficient cause being shown by him, fully to obey it, or prescribed in sections 2026 and 2027 of the Code of Civil Procedure, and (here set forth in brief his refusal or excuse).

Now, therefore, you are commanded forthwith to apprehend the said John W. Hart, and bring him before me (or before this court), at a
[L. S.] special term thereof to be held at the court house in the ——— of ———, on the ——— day of ———, 1889, at ten o'clock in the forenoon of said day.

Witness, Hon. ———, one of the justices of the Supreme Court of the State of New York at the court house in the city of ———, this 18th day of ———, 1888.

ROBERT H. MOORE, *Clerk.*

LEWIS CASS,

Attorney for Petitioner.

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No. 31.

Order of Commitment.

(Code of Civil Procedure, § 2028.)

Ante, p. 122.

At a special term of the supreme court, held at the court house, in the city of Albany, on the 22d day of May, 1888.

Present—Hon. WM. L. LEARNED, *Justice.*

IN THE MATTER OF THE APPLICATION OF PETER DOWNER FOR A WRIT OF HABEAS CORPUS (OR CERTIORARI) TO INQUIRE INTO THE CAUSE OF HIS DETENTION.	}	
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Due proof having been made (as in warrant of attach-

ment to †), and that on such proof a warrant having been duly issued for the apprehension of said John W. Hart, and said John W. Hart having been brought before this court thereby, and said John W. Hart still refusing to obey said writ, and giving no sufficient excuse or reason for such disobedience; now, therefore, it is

Ordered, That said John W. Hart be and hereby is committed to close custody in the common jail of the county of Columbia (the county in which the court or judge is, or if he is sheriff of that county, in that of some county other than his own), without being allowed the liberties of the jail, and that he so stand committed until he makes return to the said writ, and complies with any order which may be made by the court (or judge) in relation to (the person for whose relief the writ was issued).

WM. L. LEARNED,
Justice Supreme Court.

No. 32.

Precept to bring up Prisoner after Disobedience of the Writ.

(Code of Civil Procedure, § 2929.)

Ante, p. 113.

The People of the State of New York, to (the Sheriff, Coroner or, other person, to whom the warrant was directed):

WHEREAS, Due proof having been made before us, that (as in warrant of attachment to †), and,

WHEREAS, A warrant of attachment having been issued, directing you to apprehend the said John W. Hart, and bring him before the court at this term thereof, to answer therefor; and,

WHEREAS, The said John W. Hart has this day been brought before the court, and failed to show sufficient cause for his neglect and refusal to obey the writ, and still refuses to obey the command thereof:

Now, on motion of Albert Rathbone, attorney for petitioner, we do, therefore, command you to forthwith bring the said Peter Downer before this court, at a special term thereof, to be held in the court house in the city of Albany, on the 1st day of June, 1888, at ten o'clock in the forenoon, and the said Peter Downer to remain in your custody till discharged, bailed or remanded, as the court may then direct.

Witness, Hon. Wm. L. Learned, justice of the
[L. s.] Supreme Court, this 22d day of May, 1888.

ROBERT H. MOORE, *Clerk.*

Indorsed: "Granted this 22d day of May, 1888."

WM. L. LEARNED,

Justice Supreme Court.

No. 33.

Final Order on Return of Writ.

(Code of Civil Procedure, §§ 2032, 2048.)

Ante, p. 128.

At a special term of the Supreme Court, held at the court house in the city of Albany, on the 1st day of June, 1888.

Present—Hon. WM. L. LEARNED, *Justice.*

<p>IN THE MATTER OF THE APPLICATION OF PETER DOWNER, FOR A WRIT OF HABEAS CORPUS [OR CERTIORARI] TO INQUIRE INTO THE CAUSE OF HIS DETENTION.</p>
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WHEREAS (setting forth the whole proceeding).

Now, therefore, it appearing upon the return of the writ of *habeas corpus* (or *certiorari*), allowed by me, that Peter Downer is imprisoned (confined or restrained) by (name of officer or person by whom held), and no lawful cause for the said imprisonment (confinement or restraint) of said Peter Downer, or for the continuance thereof, having been shown, it is finally

Ordered, That said Peter Downer be and hereby is discharged forthwith, from the custody of said (sheriff, coroner or other person).

Dated Albany, N. Y., June 1, 1888.

WM. L. LEARNED,

Justice Supreme Court.

Or (under sections 2036, 2043.)

Now, therefore, due proof having been made by the return to said writ, and the subsequent proceedings herein, that the said Peter Downer is not unlawfully imprisoned or restrained of his liberty, but is lawfully held in the custody and control of said (sheriff or other person), under and by virtue of (state grounds), it is hereby finally

Ordered, That the said Peter Downer be and hereby is remanded to his former confinement and restraint in the custody of said (sheriff, or to the care and custody of J. H., sheriff of ——— county), under said mandate, and the said proceedings upon said writ are hereby dismissed.

Dated.

(*Signature.*)

No. 34.

Order Admitting Prisoner to Bail.

(Code of Civil Procedure, § 2045).

Ante, p. 127.

IN THE MATTER OF THE APPLICATION OF HENRY JONES FOR A WRIT OF HABEAS CORPUS (OR CERTIORARI).
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It appearing from the return to said writ and the subsequent proceedings, that said Henry Jones, so imprisoned or detained, is entitled to be admitted to bail. Now, therefore, it is

Ordered, That the said Henry Jones be and hereby is discharged from imprisonment under said (warrant), and from the custody of said (sheriff), upon his entering into

a recognizance, with two sufficient sureties, in the sum of two thousand dollars, to the people of the State of New York, to appear at the next court of special sessions to be held in and for the county of Albany, at the court house in the city of Albany, on the 18th day of June, 1888, at ten o'clock in the forenoon, then and there to be dealt with as justice shall require.

Dated ALBANY, N. Y., *June 2d*, 1888.

JOHN C. NOTT,
County Justice.

No. 35.

Judge's Certificate of Compliance to be Indorsed on Order.

(Code of Civil Procedure, § 2049.)

Ante, p. 129.

I, John C. Nott, county judge of Albany county, having granted the within final order, do certify that Henry Jones, the within named prisoner, has given the undertaking required by section 2045 of the Code of Civil Procedure, and is entitled to be discharged from imprisonment.

Dated ALBANY, N. Y., *June 9*, 1888.

JOHN C. NOTT,
County Judge.

No. 36.

Petition for Warrant for Prisoner about to be Removed.

(Code of Civil Procedure, § 2054.)

Ante, pp. .

(As in petition for *habeas corpus* to †.)

That (state facts fully but briefly), and that there is good reason to believe that he will be carried out of the State, or suffer irreparable injury, before he can be relieved by a writ of *habeas corpus* or *certiorari*.

That no previous application has been made for arrest herein (or if made, to whom and what facts have been discovered, etc.).

Wherefore, deponent asks that a warrant may issue, directed to the proper officer, commanding him to take and forthwith bring before the court the said Henry K. Thomas (and the said J. H., sheriff, § 2055), to be dealt with according to law.

Dated ALBANY, *Sept. 2, 1890.*

HENRY K. THOMAS.

(Verification.)

No. 37.

Warrant to Bring up Prisoner About to be Removed.

(Code of Civil Procedure, § 2054).

Ante, p. 144.

The People of the State of New York to the Sheriff of the county of Albany (or coroner, or John Doe):

It appearing to the satisfaction of this court, by the petition of Henry K. Thomas, sworn to the 2d day of September, 1890, that (statement of facts), and that there is good reason to believe that he will be carried out of the state, or suffer irreparable injury, before he can be relieved by a writ of *habeas corpus* or a writ of *certiorari*:

Now, therefore, we command you to forthwith take and bring before me, the said Henry K. Thomas, to be dealt with according to law.

Witness my hand this 2d day of September, 1890, at the court house in the city of Albany, N. Y.

JACOB H. CLUTE,

County Judge.

WILLIAM T. SMITH,

Attorney for Petitioner.

(Office and P. O. Address.)

No. 38.

Notice of Appeal from an Order Refusing to Grant Writ of Habeas Corpus or Certiorari.

(Code of Civil Procedure, § 2058.)

Ante, p. 142.

(As in Form No. 14.)

No. 39.

Order Fixing Bail Pending Appeal.

(Code of Civil Procedure, § 2060.)

Ante, p. 142.

At a special term of the Supreme Court, held in and for
the county of Columbia, at the court house in
Hudson, on the 18th day of March, 1890.

Present—Hon. SAMUEL EDWARDS, *Justice*.

IN THE MATTER OF THE APPLICA- TION OF RICHARD COLLINS FOR A WRIT OF HABEAS CORPUS OR CER- TIORARI.	}
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A writ of *habeas corpus* (or *certiorari*), having been heretofore issued on the application of Richard Collins, and the said Richard Collins having been brought before the court, as commanded in said writ, and a final order having been made by the court, dated the 18th day of March, 1890, by which said writ was dismissed, and said Richard Collins was remanded; now, after hearing Everett Fowler, Esq., for the prisoner, and Edwin D. Howe, Esq., district attorney, opposed, and it appearing that the offense with which the said Richard Collins is charged is a bailable one, and that the said Richard Collins has taken an appeal (or intends to take an appeal), from the said final order to the general term of the Supreme Court, it is

Ordered, That the said Richard Collins be admitted to bail pending such appeal in the sum of \$1,000, and that he be discharged upon perfecting said bail.

Witness, Hon. SAMUEL EDWARDS, Justice of the
[L. S.] Supreme Court, at the court house in Hudson,
this 18th day of March, 1890.

ISAAC P. ROCKEFELLER, *Clerk*.

Indorsed: Granted this 18th day of March, 1890.

SAMUEL EDWARDS,

Justice Supreme Court.

No. 40.

Recognizance on Appeal from Order Denying Writ.

(Code of Civil Procedure, §§ 2061, 2062.)

Ante, p. 142.

STATE OF NEW YORK, }
 County of Columbia, } ss.:

Be it remembered, that on this 20th day of March, 1890, Richard Collins, of the city of Hudson, in said county, and Henry H. Roe, of the same place, merchant, and Edward L. Feenan, of the same place, banker, personally came before Samuel Edwards, a justice of the Supreme Court of the State of New York, and severally and respectively acknowledged themselves indebted to the people of the State of New York in the sum of \$1,000, to be levied of their respective goods and chattals, lands and tenements, to the use of said people, if default be made in the condition following :

WHEREAS, The above-bounden Richard Collins is in the custody of John M. Fells, sheriff of Columbia county, under a commitment made by Henry Day, recorder of said city of Hudson, on a charge of manslaughter; and,

WHEREAS, An application has been made on behalf of said Richard Collins for a writ of *habeas corpus* (or *certiorari*), and the prisoner having been brought up and a hearing had, and the proceedings dismissed, and the said prisoner, Richard Collins, remanded by a final order of this court; and,

WHEREAS, Said Richard Collins having taken an appeal from said final order, and an order granted admitting him to bail, pending said appeal:

Now, therefore, the condition of this recognizance is such, that if the said Richard Collins shall appear at a general term of the Supreme Court, to be held at the court house in the village of Saratoga, on the 6th day of September, 1890, and perform and abide by the judg-

ment of said court on said appeal, this recognizance to be void; otherwise to remain in full force and effect.

RICHARD COLLINS, [L. S.]

HENRY H. ROE, [L. S.]

EDWARD L. FEENAN. [L. S.]

Subscribed and acknowledged before me, the day and year first above written.

SAMUEL EDWARDS,
Justice Supreme Court.

STATE OF NEW YORK, }
County of Columbia, } ss.:

Henry H. Roe and Edward L. Feenan, being severally sworn, each for himself, deposes and says, that he is one of the sureties named in the foregoing recognizance; that he is a resident and householder of the county of Columbia, and is worth the sum of one thousand dollars over and above all debts and liabilities against him.

HENRY H. ROE,
EDWARD L. FEENAN.

Subscribed and sworn to before me, }
this 20th day of March, 1890. }

SAMUEL EDWARDS,
Justice Supreme Court.

Approved March 20, 1890.

SAMUEL EDWARDS,
Justice Supreme Court.

The Writ of Certiorari to Supply Defect in Record.

No. 41.

(Code of Civil Procedure, § 2124.)

Ante, p. 155.

The People of the State of New York [on the relation of Henry Dake] to the County Court of Albany County :

WHEREAS, In a certain appeal now pending in this Supreme Court, in the action of John Doe against Richard Roe, it is necessary, in order to supply a defect in the record before this court, that the record hereinafter mentioned and described should be produced in this court, and justice requires that said defect should be supplied, and adequate relief cannot be obtained by an order:

Now, therefore, we command and enjoin you, that you do certify and return to this court, at a general term thereof, to be held at the court house, in the village of Saratoga, on the 8th day of September, 1890, under your hand, the complete record of the action of John Doe against Richard Roe.

Witness, Hon. Wm. L. Learned, one of the Justices of the Supreme Court, this 2d day of September, 1890.

ANSEL C. REQUA, *Clerk.*

GEORGE C. BAKER,
Attorney for Richard Roe.

Allowed this 2d day of September, 1890.

WM. L. LEARNED,
Justice Supreme Court.

The Writ of Certiorari to Review.

No. 42.

Petition for Writ.

(Code of Civil Procedure, § 2127.)

Ante, pp.

To the Supreme Court of the State of New York :

The petition of William L. Townsend respectfully shows to the court:

That (here give a complete history of the matter).

That this petitioner is advised that the determination of (court, board, or officer) can be reviewed by writ of *certiorari*, and relief granted your petitioner.

That no previous application has been made for a writ of *certiorari* in this matter.

Wherefore, your petitioner prays that a writ of *certiorari* may be issued and allowed by this honorable court, [directed to the said (court, board, or officer), commanding (it, him or them) to certify and return to this court all the records of said proceedings of said (court, board, or officer) in the above mentioned proceedings, with all things pertaining thereto, to the end that said (decision or action) of said (court, board or officer) may be reviewed and corrected on the merits by this honorable court, and that your petitioner may have such other and further relief as to the court may seem just, and that all proceedings on account of such (decision or action) by (court, board, person or officer) be stayed until the hearing and determination upon this writ.

Dated *October 1*, 1890.

WILLIAM L. TOWNSEND.

(Verification.)

No. 43.

Order to Show Cause why Writ should not be Granted.

(Code of Civil Procedure, § 2128.)

Ante, p. 158.

SUPREME COURT.

IN THE MATTER OF THE APPLICA- TION OF WILLIAM L. TOWNSEND, FOR A WRIT OF CERTIORARI.
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On reading and filing the verified petition of William L. Townsend, praying for a writ of *certiorari* to review the (decision or action) of (court, board or officer), on (state fully proceeding as in petition), and that proper grounds exist for the granting of an order to show cause:

Now, on motion of George C. Baker, attorney for relator, let (court, board or officer) show cause at a special special term of this court, to be held at the city hall in the city of Albany, on the 14th day of October, 1890, at the opening of court, why a writ of *certiorari* should not be granted to bring up before this court the proceedings of said (court, board or officer), on said (matter). Let service be made on or before October 2, 1890.

Dated *October 1*, 1890.

WM. L. LEARNED,

Justice Supreme Court.

No. 44.

Order Granting Writ with Stay.

(Code of Civil Procedure, § 2128.)

Ante, p. 158.

At a special term of the Supreme Court, held at the city hall in the city of Albany, on the 14th day of October, 1890.

Present—Hon. WM. L. LEARNED, *Justice.*

IN THE MATTER OF THE APPLICA- TION OF WILLIAM L. TOWNSEND, FOR A WRIT OF CERTIORARI.
--

On reading and filing the petition of William L. Townsend, verified the 1st day of October, 1890, and after hearing George C. Baker, Esq., for the petitioner, and Charles O. Pratt, Esq., opposed; it is

Ordered, That a writ of *certiorari*, as prayed for in said petition, be issued, directed to (court, board or officer).

That said writ be returnable to the clerk of the Supreme Court, in and for the county of Albany, in the city of Albany, within twenty days after service thereof, and that said writ be allowed and signed and sealed by the clerk of this court.

It is further ordered, that all further proceedings in said (matter) be stayed, pending this *certiorari*, or until the further order of this court.

Entered in Albany county.

WM. L. LEARNED,

Justice Supreme Court.

No. 45.

Writ of Certiorari.

(Code of Civil Procedure, § 2128.)

Ante, p. 158.

The People of the State of New York in the relation of William L. Townsend, to (court, board or officers):

WHEREAS, We have been informed, by the petition of William L. Townsend, verified the 1st day of October, 1890, that certain proceedings were had before you [here state proceedings as in petition], and we being willing, that you do certify and return those proceedings, with all things appertaining thereto, within twenty days after the service upon you of this writ, at the office of the clerk of the Supreme Court, in and for the county of Albany, in the city of Albany, under your hand, as fully as the same remains before you to the end that our Supreme Court may review and correct on the merits the said (decision or action), of said (court, board or officer),

and that the same may be reviewed or corrected according to law, as to the court may seem just.

Witness, Hon. Wm. L. LEARNED, one of the justices of the Supreme Court, at the city hall, in the city of Albany, on the 14th day of October, 1890.

ANSEL C. REQUA,
Clerk.

GEORGE C. BAKER,
Attorney for Relator.

No. 46.

Return to Writ of Certiorari.
(Code of Civil Procedure, § 2134.)

Ante, p. 161.

SUPREME COURT:

THE PEOPLE OF THE STATE OF NEW YORK <i>ex rel.</i> WILLIAM L. TOWNSEND <i>against</i> (COURT, BOARD OR OFFICER).	}
---	---

The return of (court, board or officer), to the writ of *certiorari*, a copy of which is hereto annexed:

I (or the court, board or officer), certify and return, to the Supreme Court, that (here state in full the proceedings), and have annex a transcript of the record (or proceedings), certified by me, specified in and required by said writ.

In witness whereof, I (or we), have hereunto set my hand and seal this 28th day of October, 1890.

[L. S.]

J. H.
(*Official Title.*)

No. 47.

Order Dismissing Writ.

(Code of Civil Procedure, § 2144.)

Ante, p. 169.

At a general term of the Supreme Court of the State of New York, held in and for the Third Judicial Department of said State, at the court house, in the city of Albany, on the 3d day of November, 1890.

Present—Hon. WM. L. LEARNED, *Presiding Justice*;
Hons. CHARLES R. INGALLS and STEPHEN L. MAYHAM,
Associate Justices.

THE PEOPLE OF THE STATE OF NEW YORK <i>ex rel.</i> WILLIAM L. TOWNSEND	}
---	---

against

(COURT, BOARD OR OFFICER).	}
----------------------------	---

This matter coming on to be heard on the petition, writ of *certiorari*, and the return thereto, and after hearing George C. Baker, Esq., counsel for relator, and Charles Pratt, Esq., counsel for respondent, it is

Ordered, That the writ of *certiorari*, herein granted, and tested on the 14th day of October, 1890, and the proceedings thereon, be and the same is hereby dismissed,* with sixty dollars costs and disbursements to the respondent.

JAMES GLEASON,
Deputy Clerk.

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